Supreme Court, U.S.
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No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,
v.
SPRINT COMMUNICATIONS COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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VANESSA RUIZ
Acting Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

*EDWARD SCHWAB
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001
Tel: (202) 727-6252, Ext. 3305

**Counsel of Record*

QUESTION PRESENTED

Whether the internal consistency test enunciated in *Tyler Pipe Industries v. Washington Dept. of Revenue, 483 U.S. 232 (1987)* requires a court to invalidate a fairly apportioned state tax which confers no inherent benefits on local taxpayers simply because, if all other states adopted the same tax, some taxpayers might be encouraged to try to spread their personal property among the states in proportion to the revenues earned in each.

PARTIES

Petitioners are the District of Columbia; Sharon Pratt Kelly, Mayor of the District of Columbia; and Lorraine J. Britton, Director of the District of Columbia Department of Finance and Revenue. Respondents are Sprint Communications Company, L.P.; Cable & Wireless Communications, Inc.; Metromedia Communications Corporation; Metro Telecommunications Services, Inc.; RealCom Office Communications, Inc.; ALLNET Communication Corporation; American Telephone and Telegraph Company; AT&T Communications of Washington, D.C.; Long Distance Service of Washington, Inc.; and Mid Atlantic Telecom, Inc.

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Petition for a Writ of Certiorari
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The District of Columbia, Mayor Sharon Pratt Kelly, and Lorraine Britton, Director, Department of Finance and Revenue, petition the Court for a writ of certiorari to review a decision of the District of Columbia Court of Appeals.

OPINIONS BELOW

The March 15, 1994, decision of the District of Columbia Court of Appeals (App. 1-27) is not yet reported. The February 19, 1992, decision of the Tax Division of the Superior Court of the District of Columbia (App. 28 - 51) is not reported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on March 15, 1994. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause (Art. I, § 8, Cl.3) of the United States Constitution provides that:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

The statutes involved in this case are reproduced in the appendix. They are D.C. Law No. 7-25 (Oct. 1, 1987) and D.C. Code §§ 47-1508, 47-2005, 47-2006, and 47-2501 (Supp. 1989).

STATEMENT OF THE CASE

This case was filed by the ten long-distance telephone companies who are respondents here, to challenge the constitutionality of the District of Columbia Gross Receipts Amendment Act of 1987, D.C. Law 7-25 (A. 76 -82). The long-distance companies are in the business of selling long-distance telephone service in the District of Columbia and elsewhere. They provide interstate and international long-distance service and are precluded from providing local telephone service. *See United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem.*, 460 U.S. 1001 (1983).

The 1987 law extended the gross receipts tax applicable to local telephone, gas, and electric companies, to telephone companies offering long-distance service, and it taxes gross receipts from long-distance calls which originate or terminate in the District and are locally billed. D.C. Code § 47-2501(b) (Supp. 1989). The Amendment Act was enacted in response to restructuring of the telephone industry, which left long-distance services untaxed in the District of Columbia under either the gross receipts or the sales tax. See *District of Columbia v. Chesapeake & Potomac Telephone Co.*, 516 A.2d 181 (D.C. 1986).[1/] Sales taxes and gross receipts taxes are the major District taxes on all retail business transactions conducted in the District of Columbia, and the restructuring meant that the retail sale of long-distance calls entirely escaped both taxes. *Id.*

The gross receipts tax was originally enacted by Congress in 1902; the businesses subject to it were banks, insurance companies, and gas, electric lighting, telephone, and street railroad utilities. Act of July 1, 1902, Ch. 1352, § 6, ¶¶ 5-7, 32 Stat. 619. This tax was considered a personal property tax that was measured by gross earnings; there was an exemption from *ad valorem* personal property taxation. *Id.*[2/] Congress

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[1/] Prior to the breakup of American Telephone & Telegraph Company in 1984, the District taxed most long distance business by taxing the local monopoly on its share of the receipts of AT&T's long distance business. *Chesapeake and Potomac Telephone Company* held that, after AT&T was separated from the local monopoly, the District could no longer recover receipts of long distance service by taxing on the local monopoly. See A. 32-33.

[2/] Personal property taxes on utilities and transportation companies measured by gross earnings or gross receipts were common at that time. *United States Express Co. v. Minnesota*, 223 U.S. 335, 347 (1912); L.

(continued...)

amended the law in 1939 to cover only gas, electric lighting, and telephone utilities and to tax gross receipts rather than gross earnings; it continued the personal property tax exemption. Act. of July 26, 1939, § 2, ch. 367, 53 Stat. 1107-08. This law substituted "gross receipts" for "gross earnings" because the courts had "held that 'gross earnings' means 'gross receipts' less expenditures in producing the commodity or service." H.R. Rept. No. 808, 76th Cong., 1st Sess. 6 (Jan. 9, 1939); S. Rept. 662, 76th Cong., 1st Sess. 4 (Jan. 23, 1939). The purpose of the amendment was "to tax the 'gross receipts' without the deduction for any expense." *Id.* Companies subject to the tax when the amendments were proposed to add long distance calling paid taxes at a rate of 6.7 percent of their gross receipts. D.C. Code § 47-2501 (Supp. 1989).

The 1987 law amended the gross receipts statute to cover gross receipts of long-distance telephone companies which provide service in the District. Gross receipts from long-distance calls that are billed to a District of Columbia telephone and are made from or to a District telephone are taxed. D.C. Code § 47-2501 (Supp. 1989). The amendments imposed a 6.7% tax on gross receipts beginning on September 1, 1987, payable on a monthly basis. The estimated revenue from this portion of the tax was $18.5 million per year. Report of the D.C. Council Finance and Revenue Committee on Bill No. 7-186, "Gross Receipts Amendment Act of 1987" at 10 (June 29, 1987).

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[2] (...continued)

Tribe, AMERICAN CONSTITUTIONAL LAW, § 6-19 at 464 nn. 19 & 20 (1988).

The law also provided exemptions from taxation similar to, but more limited than, the exemptions that were given to the utilities subject to the tax. The law exempts the personal property of long-distance companies used to generate receipts subject to the tax from *ad valorem* personal property taxation; property used for other purposes is not exempt. § 47-1508(a)-(3)(B). It also exempts purchases of property that will be used to generate gross receipts subject to the tax from sales and use taxes. D.C. Code §§ 47-2005(5) and 47-2206(1).[3/] These provisions also provide a credit for personal property tax paid to the District for the period of retroactivity, from July 1, 1986 to September 30, 1987.

The legislative history of the 1987 act states that the personal property and sales and use taxes exemptions were to provide the long-distance companies "equal treatment" with the gas, electric, and local telephone companies already subject to the tax and to avoid excessive taxation by allowing "the affected companies to help offset their future gross receipts tax burden." Report of the D.C. Council Finance and Revenue Committee, *supra* at 8. The legislative decision to limit the

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[3/] The exemption provisions of the 1987 act exempt, in relevant part:

> The personal property of any telecommunications company . . . used or consumed in furnishing a service if the receipts from furnishing the service are subject to a gross receipts tax in force in the District . . . [D.C. Code § 47-1508(a)(3)(B) (Supp. 1989)];
>
> Sales of property purchased by a telecommunication company . . . for use or consumption in furnishing the service or commodity are subject to a gross receipt tax or mileage tax in force in the District . . . [D.C. Code § 47-2005(5) (Supp. 1989)];
>
> Sales upon which taxes are properly collected under [District of Columbia Gross Sales Tax provisions] . . . [D.C. Code § 47-2206(1) (Supp. 1989)].

exemptions to personal property used to produce the gross receipts that are taxed was explained in the July 13, 1987, memorandum of John Wilson, Chairperson of the Committee, to other Councilmembers; he stated:

> The exemption for these [long-distance] companies will only be granted for personal property used or consumed in furnishing a service or commodity subject to a gross receipts tax.
>
> This amendment is being offered at the request of the Executive. It is felt that a rational basis exists for treating companies in the competitive marketplace in a manner different than companies which are subject to local rate regulation.[4/]

In the trial court, the long-distance companies asserted that this tax was unconstitutional under the Commerce and the Due Process Clauses because it was allegedly unfairly apportioned; discriminates against interstate commerce; and is not fairly related to services provided by the District. They also asserted that the tax violates the Due Process Clause, because it is retroactive, and because of burdens of computing the tax. The companies additionally asserted that the District does not have authority to enact tax laws, because Congress cannot delegate authority to tax, and that the tax violates the Supremacy Clause because it taxes the United States. On cross-motions for summary judgment the trial court upheld the 1987 act in all respects and rejected all of the telephone companies' challenges to the tax.

[4/] The personal property of companies providing local telephone service subject to the gross receipts tax is wholly exempt from personal property taxes. D.C. Code § 47-1508(3)(A) (1990 repl. vol.). The provision of such local service is a regulated monopoly. *See United States v. American Telephone & Telegraph Co., supra.*

The telephone companies argued that the personal property and sales tax exemptions discriminate against companies based outside the District. The trial court rejected this claim on the ground that the tax is facially neutral and treats all long-distance companies the same way. The trial court relied on the affidavit of Thomas E. Kerwin, the supervisory tax auditor assigned to monitor the long-distance companies' tax compliance, which indicated that the long-distance companies had a substantial presence in the District of Columbia; and large amounts of personal property in the District to generate long-distance services.[5/] The court stated:

> The 1987 Gross Receipts Act is facially neutral. *Every* long distance carrier owning property in the District of Columbia is subject to a personal property tax imposed by the District and *every* long distance carrier is entitled to a credit exemption to the extent that his personal property is used to produce gross receipts. Those companies who do not own property in the District are not only unable to avail themselves of the personal property exemption/credit, but they are also free from all personal property taxes in the District of Columbia. All of the Petitioners except Long Distance Services of Washington, Inc. (which leased capacity) have taken the credit in substantial amounts regarding the taxes which are the subject of the present suit for refund.

[5/] Mr. Kerwin stated that the respondent telephone companies had benefited from the personal property exemption in the following amounts during the period from July 1, 1986 through February 28, 1989:

Sprint Communications, Inc.	$802,568.00
AT&T	$652,518.00
Allnet Communications	$117,458.00
Cable & Wireless	$181,084.80
ITT	$ 60,138.00
Contel	$ 36,439.00
Starnet	$ 1,497.10

> "Such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business." *Armco, Inc. v. Hardesty*, *supra* at 645. This credit has been preserved on the taxes against the telephone companies from the original Gross Earnings Tax of 1902 through the Toll Telecommunication Act of 1989.

(A.43-44; emphasis in original).

The respondent long-distance companies, who claimed to be based outside the District of Columbia, argued in the Court of Appeals that the personal property and sales and use tax exemptions were discriminatory because "they receive no offset against the gross receipts tax for personal property, sales, and use taxes paid to their home jurisdiction." (A. 16-17) The Court of Appeals considered it irrelevant that all of the long-distance companies operate in the District, have a substantial presence there, and have received exemptions from the District's personal property tax under the 1987 Act. (A. 22) The court also considered it irrelevant that the long-distance companies "have not yet shown that . . . they have been subjected to heavier taxation because of the taxing schemes of other jurisdictions." (A. 22)

The Court of Appeals applied the "internal consistency" test of discrimination, relying especially on *Tyler Pipe Indus. Inc. v. Washington Dep't. of Revenue*, 483 U.S. 232 (1987), and held that the tax was unconstitutional for failure to exempt all property in the District of Columbia from personal property and sales and use taxes. The Court of Appeals stated:

> The discriminatory consequences of the 1987 Act arise from the circumstance that, if the same limited exceptions existed in every state, then out-of-state carriers would pay more than in-state carriers whenever the former had property subject to their home state's per-

sonal property tax but used to produce out-of-state revenues subject to another state's gross receipts tax.

* * * *

Commerce clause discrimination arises because the 1987 Act provides only a limited exemption, or credit, to the extent that the company uses personal property in the District of Columbia to produce those receipts. As appellants hypothesize:

> A company which concentrated its property in one state but provided services in many would pay a gross receipts tax on all of its receipts and personal property tax (and sales and use taxes) on all but a small portion of its personal property. In contrast, a company which spread its property among the several states in proportion to the revenues derived therefrom--thereby becoming essentially equivalent to a "home operator" in each state--would pay a gross receipts tax but would not pay personal property taxes or sales or use tax *anywhere*.

(A. 22-23; emphasis in original).

The Court of Appeals recognized that the consequences of the adoption by all states of the District's tax were not predictable. Nevertheless, based on *Tyler Pipe*, the court stated that interference with "the 'federal free market trade unit,'" was a sufficient basis to invalidate the law. (A. 23-24) Reliance was placed on the dissenting opinion of Justice Goldberg in *General Motors Corp. v. Washington*, 377 U.S. 436, 461 (1964), where he stated:

> Nondiscrimination alone is no basis for burdening the flow of interstate commerce. The Commerce Clause "does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded

> from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the States. It is immaterial that local commerce is subjected to a similar encumbrance."

(A. 24; citation omitted.) The court therefore held the tax unconstitutional.

Judge Farrell stated in his concurring opinion that he felt compelled by *Tyler Pipe* to join in the court's opinion. (A. 27) However, he suggested that this Court should "reexamine" the "internal consistency principle, as a test for identifying forbidden commerce clause discrimination outside the fair apportionment context." (A. 27) He believed the District tax to be reasonable as a means of preventing double taxation and expressed the view that "[b]efore the District must refund the potentially millions of dollars at stake here, it deserves a better explanation than *Tyler Pipe* provides for the invalidity of its tax scheme." *Id.*

REASONS FOR GRANTING THE WRIT

The District of Columbia and its Mayor seek review of the decision of the District of Columbia Court of Appeals which declared the Gross Receipts Amendment Act of 1987 unconstitutional under the "internal consistency" test for determining whether a tax discriminates against interstate commerce in violation of the Commerce Clause. The District's tax at issue --its tax on long distance telephone service--is non-discriminatory on its face; has not been shown to be motivated by any desire to protect local businesses against out-of-state competitors, or to have such an effect; and has no inherent tendency to protect local enterprises or to disadvantage interstate com-

merce. Furthermore, the tax was a sensible and reasonable response to the situation in the industry that it addressed.

The court of appeals believed that it was compelled to invalidate the tax because of the way the Court applied the internal consistency test in *Tyler Pipe*. We submit that *Tyler Pipe* does not require that result, because here, if the District's tax is replicated, it does not result in the protection of wholly intrastate commercial activity, as was the case there. But if *Tyler Pipe* does require that the District's 1987 tax be invalidated, then *Tyler Pipe* should be reconsidered.

The tax here has been struck down solely because of hypothetical concerns which are extremely unlikely to have any basis in reality. When a legal test becomes so divorced from its purposes (here, protecting interstate actors against actual disadvantages) and from reality, the time has come to redefine--or reconsider--the test. With respect to the "internal consistency" test, that time is now.

1. In 1987, the District of Columbia sought to tax this industry because, due to revolutionary changes in the industry, the industry had escaped virtually all D.C. taxes on businesses. See *District of Columbia v. Chesapeake & Potomac Telephone Co., supra.* When it addressed the industry in 1987, the Council used as a model the gross receipts tax enacted by Congress, as the legislature for the District of Columbia, in 1902 and 1939. That was a gross receipts tax on the gas, electric, and local telephone utilities, a congressional substitute for personal property and sales and use taxes.[6/]

[6/] Special taxes such as these, falling on a limited class of taxpayers in lieu of other taxes, have been recognized as valid under dormant Commerce Clause analysis for more than a century. *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 696 (1895); *Railway Express Agency, Inc. v.*

(continued...)

The Council also faced a situation where there was one very large interstate carrier headquartered in the District, MCI Telecommunications Corporation. The District had several options with respect to how to treat this situation, in which most of the long-distance carriers had substantial personal property in the District,[7/] but one of them had a great deal of personal property that had nothing to do with long distance calls to and from D.C. The Council could have provided the same full exemption for personal property and sales and use taxes provided to those already covered by the tax,[8/] or it could have eliminated the exemptions entirely. A full exemption would have greatly benefited the competitive position of MCI, by permitting it to eliminate the entire personal property tax on its headquarters operation. Eliminating the personal property exemption entirely would have opened the District to the argument that it was double-taxing long-distance services and subjecting it to more taxes than any other business activities in the District of Columbia. The Council chose a middle ground between those two. It chose to exempt personal property to the extent that the property generated the gross receipts subject to the tax. D.C. Code § 47-1508(3)(B) (Supp. 1989). *See also* 9 D.C.M.R. § 709.1(c) (1994). That alternative

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[6/] (...continued)

Virginia, 358 U.S. 434, 436 (1959). Such taxes are internally consistent because, if enacted everywhere, all taxpayers subject to the tax will pay the special gross receipts tax and none will pay the taxes replaced by the special tax.

[7/] See n.5, *supra.*

[8/] See D.C. Code § 47-1508(3)(A) (1990 repl. vol.) which wholly exempts the personal property of any gas, electric or local telephone company from personal property taxes.

seemed to avoid either undue preference or undue penalty for a carrier with a large physical presence in the District.[9/] In short, it seemed to be a fair and reasonable response to the situation the Council confronted.[10/]

2. As explained by the trial court in this case (quoted above at 7-8), the District's tax on long distance carriers is not discriminatory on its face: all long distance carriers in the District are subject to the same tax; each is entitled to an exemption from personal property taxes to the extent that its personal property generates gross receipts subject to the tax; all that have property in the District (all but one of the respondents here) have in fact realized substantial benefits from the

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[9/] A relatively large physical presence in the District ordinarily entails greater demands on local services--police and fire protection, street maintenance, waste collection, water and sewer service, and so forth--all of which sap the local treasury.

[10/] By its terms D.C. Code § 47-1508(3)(B) exempts "personal property . . . used or consumed in furnishing a service." A formula has been created to determine the amount of the exemption. The formula provides:

COLUMN (1)		COLUMN (2)		COLUMN (3)		COLUMN (4)
Current personal property tax due before column (4) credit	X	Receipts on which District gross receipts tax is paid for twelve preceding months / Gross Receipts everywhere for for twelve months preceing column (1) tax year	X	Value of personal property elsewhere July 1 of column(1) tax year / Value of property subject to District personal property tax on July 1 of column (1) tax year	=	Credit against column (1) tax NOT to exceed limits of this section

9 D.C.M.R. § 709.1(c) (1994).

exemption. *See* n.5, *supra*. The law is facially neutral, giving all the telecommunications companies subject to it to the same tax treatment; subjecting them to the same tax burdens and exemptions.

There is no evidence that this law was drafted with a discriminatory purpose or design. Instead, the evidence shows that the Council merely extended the existing tax law to the long-distance telephone companies, which, because of changes in the industry, had become untaxed. The personal property exemption generally follows the prior tax structure. Congress had traditionally exempted companies subject to the gross receipts tax from the personal property tax.[11/] As indicated, the Council's decision to limit the personal property tax exemption avoided creating too great a benefit for a company with a great deal of personal property in the District, while at the same time avoiding making this tax unduly onerous (by either historical or contemporary standards).

[11/] Historically, Congress treated the gross receipts tax as an alternative to the personal property tax. A previously indicated (n.2, *supra*), the gross receipts tax was termed a personal property tax when first enacted in 1902. It was considered appropriate to tax personal property of utility and transportation companies in this manner because "the property" of these taxpayers "being much of it of an intangible character, is difficult to reach and properly assess for taxation." *United States Express Co. v. Minnesota*, 223 U.S. 335, 347 (1912); *see also Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 455-56 (1918). A personal property tax measured by gross receipts was upheld in other cases. *Pullman Co. v. Richardson*, 261 U.S. 330, 338 (1923); *Northwestern Life Ins. Co. v. Wisconsin*, 247 U.S. 132, 138 (1918). When a personal property tax was measured by gross receipts, it was required to be in lieu of other property taxes. Otherwise, there would be a constitutionally impermissible duplication of tax burdens within the same jurisdiction. *Oklahoma (Meyer) v. Wells, Fargo & Co.*, 223 U.S. 298, 300-301 (1912); L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-19 at 464 nn. 19 & 20 (1988). The prohibition against taxing both gross receipts and personal property probably does not survive *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

Because it is fairly apportioned, the tax does not unduly burden interstate commerce. It apportions gross receipts in the same way that the sales tax was apportioned in *Goldberg v. Sweet*, 488 U.S. 250 (1989). The tax falls on gross revenues from calls to or from the District that are billed to a District telephone. The tax meets the internal and external consistency tests for fair apportionment. *Id.* at 260-265. Since the tax is not facially discriminatory, the fact that it is fairly apportioned satisfies the "deeper meaning" of the Commerce Clause by fairly allocating "tax burdens between insiders and outsiders." *Trinova Corporation v. Michigan Department of Treasury*, 111 S. Ct. 818, 835 (1991); *Goldberg v. Sweet, supra*, at 265-266.

3. The Court of Appeals held that the tax at issue here violates the proscriptions on state action implicit in the Commerce Clause solely because it fails to meet the internal consistency standard which this Court applied to facially nondiscriminatory state taxes in *Tyler Pipe Industries, Inc. v. Washington Dept. of Taxation*, 483 U.S. 232 (1987). App. 22-24. As the Court of Appeals understood *Tyler Pipe*, that test is one in which it is imagined that the same tax is adopted in every jurisdiction and the resulting situation is then examined to determine whether there is overlapping taxation. App. 23-24. *Tyler Pipe* apparently requires "a method of taxation that eliminates all overlapping taxation"). In the Court of Appeals' view, overlaps are deemed to "impede the free flow of trade between the States" and to represent an effort "to protect the local market." App. 24 n.27 quoting Justice Goldberg's dissent in *General Motors Corp. v. Washington, supra*, 377 U.S. at 461. The court below thought that the "overlap" in this case is the absence of an exemption in District law for any personal property tax a carrier might have to

pay in another jurisdiction for personal property in that jurisdiction used to generate revenues in the District. App. 23. As the concurring judge below put it (*id.* at 27):

> Consider, for example, the carrier having property here that is used to generate telephone charges billable to an address outside the District. Those receipts fall outside the District's telecommunications tax on gross receipts; yet because another state hypothetically might capture them under its similar tax, the District must go further and exempt those receipts from the reach of its personal property or use taxes as well--either that or it must eliminate the exemption relieving locals from paying double taxes (personal property and gross receipts) based on a single transaction. Invalidating the tax was viewed as necessary to avoid a situation where a "company [might] spread its property among the several states in proportion to the revenues derived therefrom--thereby becoming essentially equivalent to a 'home operator' in each state . . . ."

App. 23 quoting the carriers' appellate brief.

4. Applying the internal consistency test to this tax unmoors the test from its purpose and from reality. This is because the telecommunications tax here has no inherent tendency to protect "home producers" and provides an uncertain basis for decisions as to where to do business. It provides unsure guidance because, even accepting the crucial "identical tax" hypothesis, obtaining optimum tax benefits depends on variables that are not fully controllable in the real world, and because actual decisions as to where to do business must take into account a multitude of considerations in addition to the costs of a single local tax.

a. The D.C. tax at issue here does not inherently tend to favor companies which have a presence in the District ("home-producers") over those which do not. That is demon-

PERCENT OF FIRM'S CALLS TAXED IN D.C.

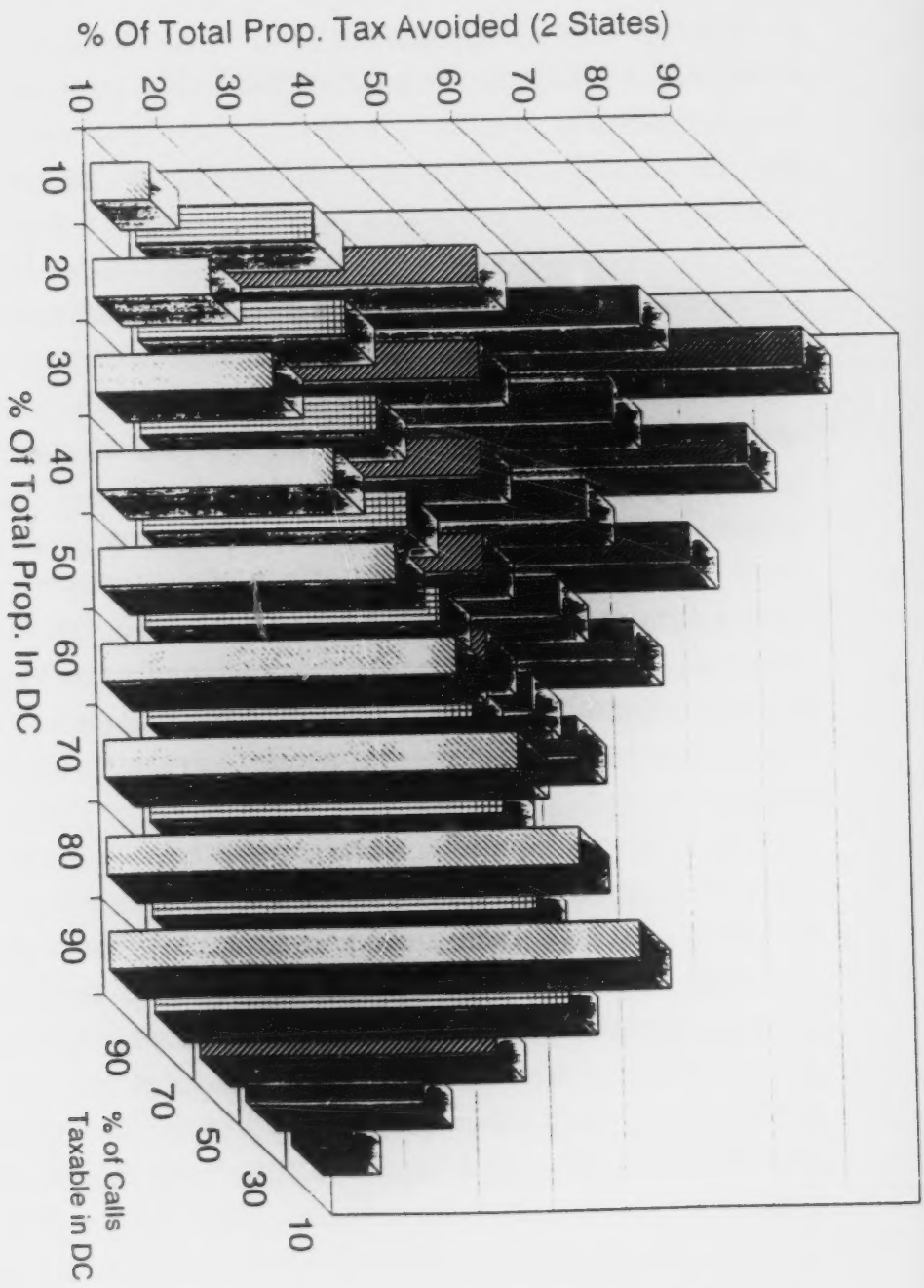
PERCENT OF TOTAL PROPERTY IN DISTRICT OF COLUMBIA

	10%	20%	30%	40%	50%	60%	70%	80%	90%
0	90 ALL MD	80 ALL MD	70 ALL MD	60 ALL MD	50 ALL MD	40 ALL MD	30 ALL MD	20 ALL MD	10 ALL MD
10%	82 1% DC 81% MD	74 2% DC 72% MD	66 3% DC 63% MD	58 4% DC 54% MD	50 5% DC 45% MD	42 6% DC 36% MD	34 7% DC 27% MD	26 8% DC 18% MD	18 9% DC 9% MD
20%	74 2% DC 72% MD	68 4%DC 64%MD	62 6% DC 56% MD	56 8% DC 48% MD	50 10% DC 40% MD	44 12% DC 32% MD	38 14% DC 24% MD	32 16% DC 16% MD	26 18% DC 8% MD
30%	66 3% DC 63% MD	62 6% DC 56% MD	58 9% DC 49% MD	54 12% DC 42% MD	52 15% DC 35% MD	46 18% DC 28% MD	42 21% DC 21% MD	38 24% DC 14% MD	34 27% DC 7% MD
40%	58 4% DC 54% MD	56 8% DC 48% MD	54 12% DC 42% MD	52 16% DC 36% MD	50 20% DC 30% MD	48 24% DC 24% MD	46 28% DC 18% MD	44 32% DC 12% MD	42 36% DC 6% MD
50%	50 5% DC 45% MD	50 10% DC 40% MD	50 15% DC 35% MD	50 20% DC 30% MD	50 25% DC 25% MD	50 30% DC 20% MD	50 35% DC 15% MD	50 40% DC 10% MD	50 45% DC 5% MD
60%	42 6% DC 36% MD	44 12% DC 32% MD	46 18% DC 28% MD	48 24% DC 24% MD	50 30% DC 20% MD	52 36% DC 16% MD	54 42% DC 12% MD	56 48% DC 8% MD	58 54% DC 4% MD
70%	34 7% DC 27% MD	38 14% DC 24% MD	42 21% DC 21% MD	46 28% DC 18% MD	50 35% DC 15% MD	54 42% DC 12% MD	58 49% DC 9% MD	62 56% DC 6% MD	66 63% DC 3% MD
80%	26 8% DC 18% MD	32 16% DC 16% MD	38 24% DC 14% MD	44 32% DC 12% MD	50 40% DC 10% MD	56 48% DC 8% MD	62 56% DC 6% MD	68 64% DC 4% MD	74 72% DC 2% MD
90%	18 9% DC 9% MD	26 18% DC 8% MD	34 27% DC 7% MD	42 36% DC 6% MD	50 45% DC 5% MD	58 54% DC 4% MD	66 63% DC 3% MD	74 72% DC 2% MD	82 81% DC 1% MD
100%	10% ALL DC	20% ALL DC	30% ALL DC	40% ALL DC	50% ALL DC	60% ALL DC	70% ALL DC	80% ALL DC	90% ALL DC

PER CENT OF PERSONAL PROPERTY TAX AVOIDED (IN HYPOTHETICAL MD & DC)
WHERE MD HAS IDENTICAL TAX AS DC (FOR DIFFERENT COMBINATIONS OF DISTRIBUTION
OF PROPERTY AND TAXABLE CALLS)

strated in the accompanying table. That table represents, in a somewhat simplified form, how the District tax operates if other jurisdictions adopt the same tax scheme. (While the table presents the situation where one other state--hypothetically, Maryland--adopts the identical tax, the same principles would hold true if any number of states adopted the D.C. tax). It shows that in those circumstances a company does *not* always benefit by increasing its presence (*i.e.*, its personal property) in the District.

In the first place, the table demonstrates that, under an identical hypothetical tax, there are two variables in each jurisdiction that determine the "optimum shelter" point for personal property (*i.e.* the point at which a firm would obtain the maximum reduction of personal property taxes in both jurisdictions combined): (1) The percentage of the firm's *business* in the District (percent of its total calls to or from D.C. and billed to the carrier in D.C.); and (2) the percentage of the carrier's *property* in the jurisdiction. In a great many circumstances, *increasing* either the company's property in the District, or its percentage of receipts in the District *decreases* the amount of personal property sheltered from personal property taxes. For example, if a carrier has 40 percent of its business in the District, increasing the percentage of its personal property in the District actually decreases the total amount of its personal property sheltered from tax in both jurisdictions combined. Thus, if 40% of its business is in D.C., by *increasing* its property from 10% to 60% in D.C., a firm *decreases* the percentage of total personal property sheltered from tax from 58% to 48%. Similarly, if a company has 40% of its personal property in D.C., *increasing* the amount of its business in D.C. from 10 percent to 60 percent *decreases* the total percentage of its personal property shel-


% Of Total Prop. Tax Avoided (2 States)
10
20
30
40
50
60
70
80
90
% Of Total Prop. In DC
% of Calls Taxable in DC

tered from tax from 58% to 48%. This is graphically illustrated at in the accompanying paragraph.[12/] The point, however, is undeniable: this tax does not inherently "favor" "home producers." Who is "favored" depends on the particular business circumstances of each individual taxpayer.

b. The consequences of a tax of this sort are not fully controllable or predictable. This is so in part because, in a competitive environment (which long distance services now are), no firm can fully control the variables that will dictate how that firm should organize to maximize its tax advantages (if that were its sole concern). Most obviously, a firm cannot control increases of its business in any competitive market; that depends in large part on the efforts of its competitors. Since a firm cannot control that key variable--and therefore cannot predict with assurance what distribution of its personal property will result in the maximum tax benefits--firms would have to base business decisions on guesses as to those consequences.

Moreover, real life decisions regarding where to do business obviously depend on much more than the consequences of a given local tax. There are almost always multiple taxes, state and local, which must be taken into account as well as a plethora of other costs--labor, travel, real estate, workers compensation, insurance, and so forth. Accordingly, the theoretical consequences of a tax scheme like the District's--even if adopted in some other jurisdictions--are unlikely to have a significant impact on how and where actual firms

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[12/] Moving from left to right on the graph implies an increase of the percentage of a firm's total property in D.C. Moving from front to back implies a decrease in the percentage of the firm's calls taxable in D.C. The height of each bar represents the total savings on personal property taxes in both jurisdictions.

choose to do business. Given their inability to control gross receipts in any jurisdiction (because of competition), and given the other considerations bearing on choices about how and where to do business, the respondents' argument that the District's tax, if replicated, will cause firms to "balkanize" their personal property is fanciful.

5. That the internal consistency test does not serve the purpose for which it is ostensibly created--to protect interstate actors from being disadvantaged relative to home state actors--is also shown by the fact that one means by which the District could meet the internal consistency test would be by arranging its taxes so that out-of-state carriers would be more severely disadvantaged. Thus, the District could satisfy the internal consistency standard by exempting from personal property taxes all personal property of carriers subject to the telecommunications gross receipts tax. However, while such a tax would be internally consistent, as interpreted by the court of appeals, it would create a substantially greater competitive "advantage" for "home producers" than the tax that was struck down because of its theoretical potential burden on interstate commerce.

6. Only truly significant risks of actual harm can justify judicial intervention invalidating a state tax law. Setting aside a state tax is a grave matter because "taxes are the life-blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935). State and local governments "chiefly rely [on taxation] to obtain the means to carry on their respective governments" and disruption of the flow of taxes "may derange the operations of government, and thereby cause serious detriment to the public." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).

Where, as here, a state taxing scheme does not discriminate on the face of the statute, and has no inherent tendency to protect "home producers," a taxpayer who wishes to show that the taxing scheme is nevertheless discriminatory should bear a heavy burden of demonstrating that there is a real risk that interstate commerce will in fact be burdened if the tax is adopted elsewhere. *See Amerada Hess Corp. v. N.J. Taxation Div.*, 490 U.S. 66, 74-75 (1989) (An apportionment scheme cannot be invalidated "whenever it *may* result in taxation of some income that did not have its source in the taxing state"; taxpayer bears the burden of "demonstrat[ing] that there is no rational relationship between the income attributable to the state and the intrastate value of the enterprise"; quoting *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169-170, 180 (1983), and *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272 (1978).

7. The Court should use this opportunity to clarify that *Tyler Pipe* is limited to state tax schemes that place greater burdens on interstate commercial activities than are imposed on similar intrastate activities. The District's tax does not do so. As Justice Scalia pointed out in his dissent in *Tyler Pipe* (483 U.S. at 257-258), the Court there extended the internal consistency test to state statutes that are not discriminatory on their face. *Tyler Pipe* should not be extended further.

The Court's opinion in *Tyler Pipe* pivots on the point that the tax scheme there, if adopted elsewhere, would protect wholly intrastate activity from burdens that fall on an interstate activity. Thus, the Court twice stressed that the vice of Washington State's tax scheme was that "the exemption only operates to impose a unified tax eliminating the risk of multiple taxation *when the acts of manufacturing and wholesaling are both carried out within the State*." *Id.* at 246; emphasis

added. *See also id.* at 248 ("The current B&O tax exposes manufacturing or selling activity outside the State to a multiple burden *from which only the activity of manufacturing in-state and selling in-state is exempt*" Emphasis supplied). However, if the District's telecommunications tax is replicated elsewhere, the result is not to protect wholly in-state commerce.

The District's tax scheme does not implicate wholly in-state commercial activity. It applies only to transactions that involve interstate commerce (calls to and from the District; *i.e.*, calls which necessarily cross a state line) and it affects local property taxes only because and to the extent that interstate commerce is involved. No wholly local commercial activity is implicated; it can only be made to seem so because, for tax purposes, part of this interstate activity is allocated to the District (*viz*, those interstate calls billed to the District). However, the allocation does not transform calls crossing state lines into an intrastate activity. Furthermore, as shown above, the allocation here is itself unquestionably valid under *Goldberg v. Sweet, supra.* Therefore, this is not a case like *Tyler Pipe*, in which a tax protected intrastate commerce.

At worst, the District's tax scheme, if replicated, might under some circumstances create a marginal incentive for a firm to locate personal property in jurisdictions in which it generates its receipts. But this Court has emphasized that, even when such a result is intended, "it is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state." *Trinova Corp., supra*, 111 S. Ct. at 835. *See also Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336-337 (1977). The Court has also been quite careful not to preclude states from providing exemptions of all sorts from personal

property taxes. *Department of Revenue of Oregon v. AFC Industries, Inc.*, 114 S. Ct. 843 (1994).[13/]

8. However, if *Tyler Pipe* requires that the internal consistency test be applied to the District's tax, the test should be reconsidered here. Justice Scalia's dissent (483 U.S. at 258-259) argues trenchantly that the internal consistency test is unsound. The test is based on the illogical premise that it is more justifiable to void a tax because of harm caused by hypothetical replication than to look at a tax's actual impact in the real world. Furthermore, the test permits and requires the courts to second-guess legislative judgments on matters that go to the very life-blood of state government without a clear risk

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[13/] The Court noted there that it is "common . . . now, as in 1976" when the statute in question was drafted, "for States with generally applicable *ad valorem* property taxes to exempt various classes of commercial property" for various "beneficial purposes." 114 S.Ct. at 850, 852. The Court listed many examples, including property tax exemptions for (a) a 10-year exemption for "new manufacturing establishments or [any] addition to an existing manufacturing establishment;" (b) "temporary exemptions of newly located or newly constructed plants, and the machinery and equipment in such plants;" (c) "business property in an 'enterprise zone';" (d) "solar energy equipment, facilities or devices" and "recycling equipment, facilities or devices;" (e) "pollution control facilities;" (f) "personal property stored in a public warehouse; and (g) "unmanufactured articles consigned for sale and held by commission merchants." *Id.* at 850, 852. A majority of states exempted "one or more classes of business personal property, including business incentives, raw materials used in textile manufacturing and allied equipment, and mechanics tools." *Id.* at 850. The Court held that "given the prevalence of property tax exemptions," congressional silence in light of other explicit prohibitions "reflects a determination to permit the States to leave their exemptions in place." *Id.* at 850.

With respect to Congressional silence, it is noteworthy here that, not only does the District legislate, as a constitutional matter, as Congress' delegate (see the Court of Appeals' decision below concerning the Origination Clause, App. 7-10), but all legislation enacted by the District's Council must lay before Congress as a precondition to its becoming law. D.C. Code § 1-233(c)(1) (1992 repl. vol.). Congress, not the Council also actually adopts the District's budget. *See* D.C. Code § 47-304 (1990 repl. vol.).

of actual harm to interstate actors. As Justice Scalia has also pointed out, *id.* at 259-260 & n.3, much of the history of the Court's prior efforts to supervise state legislation under the rubric of the Commerce Clause has been a series of debacles. Adherence to the *Tyler Pipe* internal consistency test in cases like this one seems likely to produce another.

CONCLUSION

This Court should clarify or reconsider the internal consistency test applied in *Tyler Pipe* in the context of this case. The Court should grant the petition for a writ of certiorari and reverse the decision below and hold that the 1987 District of Columbia law is a constitutionally permissible exercise of taxing authority.

Respectfully submitted,

VANESSA RUIZ
Acting Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

*EDWARD SCHWAB
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001
Tel: (202) 727-6252, Ext. 3305

**Counsel of record*

(2)

Supreme Court, U.S.
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

VANESSA RUIZ,
Acting Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

*EDWARD E. SCHWAB,
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square
Sixth Floor
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252 ext. 3305

**Counsel of Record*

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Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

District of Columbia Court of Appeals

No. 91-TX-846

SPRINT COMMUNICATIONS COMPANY, CABLE & WIRELESS COMMUNICATIONS INC., METROMEDIA COMMUNICATIONS CORPORATION NEE CSI NEE ITT, METROCOM NEE TMC, REALCOM OFFICE COMMUNICATIONS, INC. NEE CONTEL, ALLNET COMMUNICATION SERVICES, INC., MID-ATLANTIC TELECOM, INC., LONG DISTANCE SERVICE OF WASHINGTON, INC., APPELLANTS,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-252

SPRINT COMMUNICATIONS COMPANY, CABLE & WIRELESS COMMUNICATIONS, INC., METROMEDIA COMMUNICATIONS CORPORATION, CONTEL OFFICE COMMUNICATIONS, INC., ALLNET COMMUNICATION SERVICES, INC., LONG DISTANCE SERVICE OF WASHINGTON, INC., APPELLANTS,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-288

ALLNET COMMUNICATION SERVICES, INC., APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-289

CABLE & WIRELESS COMMUNICATIONS, INC., APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-338

CONTEL OFFICE COMMUNICATIONS, INC., APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-373

AMERICAN TELEPHONE & TELEGRAPH COMPANY, AT&T COMMUNICATIONS OF WASHINGTON, D.C., APPELLANTS,

v.

DISTRICT OF COLUMBIA, APPELLEE.

No. 92-TX-576

METROMEDIA COMMUNICATIONS CORPORATION, APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-577

CABLE & WIRELESS COMMUNICATIONS, INC., APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-578

RICHARD J. RICE, INC., APPELLANT

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

Appeals from the Superior Court of the District of Columbia

(Hon. John F. Doyle, Motions Judge)

(Argued October 20, 1993 Decided March 15, 1994)

Joseph A. Reiser and *William Malone*, with whom *John M. Wood*, *Mitchell F. Brecher*, and *Russell M. Blau*, were on the brief, for appellants.

Edward E. Schwab, Assistant Corporation Counsel, with whom *John Payton*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellees.

Before ROGERS, *Chief Judge*, and FERREN and FARRELL, *Associate Judges*.

Per Curiam Opinion for the court.

Concurring opinion of *Associate Judge* FARRELL at 27.

PER CURIAM: These seven consolidated appeals represent the continuation of litigation by long-distance telephone companies challenging the D.C. Gross Receipts Tax Amendment Act of 1987 (the 1987 Act). *See Barry v. American Tel. & Tel.*

Co., 563 A.2d 1069 (D.C. 1989). Appellants here[1] contend that the motions judge erred as a matter of law in granting summary judgment to the District of Columbia. Thus, we are confronted with appellants' contentions that the Council of the District of Columbia lacked the authority to enact the 1987 Act under the Origination Clause of the United States Constitution, and that the 1987 Act violates the Commerce Clause of the Constitution because the limited exemption of long-distance companies from the District's personal property tax, and certain sales and use taxes, discriminates against out-of-District of Columbia carriers. We hold that the Council had the authority to enact the 1987 Act. We further hold, consistent with recent decisions of the United States Supreme Court involving the internal consistency principle, that the limited exemptions in the 1987 Act violate the Commerce Clause. Accordingly, we reverse the grant of summary judgment.[2]

I.

The background of this tax litigation, which followed AT&T's divestiture of its local operating companies in connection with the antitrust suit in *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem.*, 460 U.S. 1001 (1983), is set forth in *Barry v. American Tel. & Tel.*

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[1] A joint brief and reply brief were filed, only on behalf of appellants Sprint Communications Co., Cable & Wireless, Metromedia, MetroCom, RealCom, Mid-Altantic, ALLNET, AT&T, and Long Distance Service of Washington, Inc. Except in Appeal No. 92-TX-373, appellees are the Mayor, the Director of the Department of Finance and Revenue, and the District of Columbia; we refer to appellees as the District of Columbia, or the District.

[2] In light of our disposition we do not reach appellants' contention that the retroactivity provision of the 1987 Act violates the Due Process Clause, and that the trial court (Judge Sullivan) erred in dismissing their motions to amend their complaint, under Super. Ct. Civ. R. 15, to show prepayment of the tax by Cable & Wireless Communications, Inc.

Co., supra, 563 A.2d at 1070-1073. For our purposes it suffices to state that the Council of the District of Columbia enacted the D.C. Gross Receipts Tax Amendment Act of 1987 in an attempt to recapture revenues that it had to refund as a result of the divesture of AT&T in January, 1984.[3] The 1987 Act required telecommunications companies previously exempt from the gross receipts tax to pay a 6.7 percent tax on gross receipts received from the sale of toll communications services that originated from or terminated on telecommunications equipment located in the District of Columbia and billed to a District telephone.[4] The 1987 Act also provided for

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3 The District government estimated that as of 1986, the exclusion of access charges from taxation as gross receipts under D.C. Code § 47-2507 (Supp. 1986), *see District of Columbia v. Chesapeake & Potomac Tel. Co.*, 516 A.2d 181 (D.C. 1986) (gross receipts from access charges are not from sale of public utility commodities and services), resulted in a revenue loss of approximately $23.6 million. *See* REPORT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA COMMITTEE ON FINANCE AND REVENUE ON BILL 7-186, GROSS RECEIPTS TAX AMENDMENT ACT OF 1987, at 7 (June 29, 1987). Under the 1987 Act, the District anticipated recovering about $20 million from the retroactive portion of the tax and collecting approximately $18.5 million annually thereafter. *Id.* at 7-8.

4 D.C. Code § 47-2501 (b)(1) (Supp. 1989) provides, in part, that all telecommunications companies were required to pay a 6.7 percent tax on the

> monthly gross receipts from the sale of toll telecommunication services that originate from or terminate on telecommunication equipment located in the District and for which a toll charge or periodic charge is billed to an apparatus, telephone, or account in the District, to a customer location in the District, or to a person residing in the District, without regard to where the bill for the service is physically received.

The tax was self-executing; every month the companies had to file an affidavit with the Mayor setting forth the amount of monthly gross receipts on which payment of the tax was to be made. *Id.* § 47-2501 (b)(1)(A).

exemptions from the District's personal property tax, and certain sales and use taxes, whenever a company had property in the District of Columbia that produced gross receipts subject to the gross receipts tax.[5] It also provided for a credit against the gross receipts tax for personal property taxes on such property paid to the District of Columbia during the period of retroactivity, July 1, 1986, through September 30, 1987.[6]

Following argument, the motions judge granted the District's motion for summary judgment, issuing a written decision on February 18, 1992.[7] *See Cable & Wireless Communications, Inc. v. District of Columbia*, Tax No. 4091-88 (D.C. Super. Ct. Feb. 18, 1992) (Opinion of Judge Doyle). Appellants now contend that the Gross Receipt Tax Amendment Act of 1987 is unconstitutional on three grounds: (1) it was enacted by the Council of the District of Columbia in violation of the

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5 *See* D.C. Code §§ 47-1508 (a)(3)(B); -2005 (5); -2206 (1) (Supp. 1989). *See infra* note 18.

6 *See* D.C. Code §§ 47-2501 (b)(3)(B), (C); -2005(5); and -2206 (Supp. 1989). The 1987 Act was superceded by the D.C. Toll Telecommunications Act of 1989. *See* D.C. Code §§ 47-3901 to 3921, -2005 (5), -1508 (a)(3)(B), -2501 (Supp. 1990). The 1989 Act added provisions crediting taxes paid to other jurisdictions on long distance calls and facilitating the means of determining data necessary for computing the tax. D.C. Code § 47-3907 (Repl. 1989). The 1992 Omnibus Budget Support Act of 1992, 39 D.C. Reg. 4895, D.C. Law 9-145, repealed the personal property tax exemption.

7 The District of Columbia filed a motion to dismiss the litigation that was still subject to the remand and direction to vacate in *Barry v. American Tel. & Tel. Co.*, *supra*, 563 A.2d at 1070, because the carriers had not complied with § 47-3307's "pay first and litigate later" rule. On June 6, 1991, Judge Sullivan granted the District's motion to dismiss. The non-AT&T appellants appealed, but this court postponed consideration of Judge Sullivan's order pending consideration of the cross-motions for summary judgment filed after AT&T's post-tax payment refund suit. Judge Sullivan transferred the consolidated cases to Judge Doyle to consider the cross-motions for summary judgment.

Origination Clause of the United States Constitution; (2) it violates appellants' right under the Commerce Clause to be free of discriminatory burdens on out-of-state competitors; and (3) it violated Due Process as a result of its retroactivity provisions in light of the foreclosure to appellants under federal law of recovery of the tax from their customers.[8] We address only the first two contentions.[9] *See Holland v. Hannon*, 456 A.2d 807, 814 (D.C. 1983) (standard of review of grant of summary judgment).

II.

Appellants contend that the 1987 Act was unconstitutional because it violated the Origination Clause in two respects: first, because the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code §§ 1-201 *et seq.* (Repl. 1992), originated in the Senate as S. 1435, 93d Cong., 1st Sess (1973), the delegation of taxing authority to the District government did not satisfy the requirement of House of Representatives origination; and second, because the Origination Clause has always been understood to apply to District of Columbia taxes, the 1987 Act is invalid.

The motions judge correctly rejected these arguments. The Origination Clause of the Constitution, art. I, § 7, cl. 1, provides that "[a]ll bills for raising revenue shall originate in the House of Representatives." As Judge Doyle observed in his opinion, the provision derived from the British tradition that money bills must originate in the House of Commons, not the House of Lords.[10] Further, the provision has never prevented

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8 Two notices of appeal therefrom were filed, a joint appeal by the non-AT&T appellants on March 6, 1992, and one by the AT&T appellants on March 18, 1992.

9 We address the Origination Clause argument because of our conclusion that the District of Columbia may yet remedy the Commerce Clause defect in the 1987 Act.

10 Opinion of Judge Doyle, *supra*, at 9 n.7 (citing (actual cite now)

delegations of taxing authority to the District of Columbia or to the territorial governments.[11] Indeed, as the District of

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3 THE NEW ENCYCLOPAEDIA BRITANNICA, MICROPAEDIA, *House of Commons*, 43 (1981)).

[11] Opinion of Judge Doyle, *supra*, at 10. Thus, from its beginnings, the city of Washington, a municipal corporation, was given the "full power and authority to pass all by-laws and ordinances," and the power "to lay and collect taxes." Act of May 3, 1802, Incorporating the City of Washington, ch. 53, 2 Stat. 195, 197; *see also* Act of May 4, 1812, Amending the Charter of Washington, ch. 75, 2 Stat. 721, 725; Act of July 1, 1812, relative to the Levy Court of Washington County, ch. 117, 2 Stat. 771, 772. Later reorganizations by Congress delegated authority to the District government to enact tax measures. *See* Act of May 15, 1820, Reorganization of the Government of the City of Washington, ch. 104, 3 Stat. 583, 586-588; Act of May 17, 1848, Reorganizing the Government of the City of Washington, ch. 42, 9 Stat. 223-224; Act of Feb. 21, 1871, To Provide a Government for the District of Columbia, ch. 62, 16 Stat. 419, 422-25, 427.

See also Act of Mar. 26, 1804, ch. 38, 2 Stat. 283, 284 (splitting Louisiana territory into two territories); Act of Apr. 20, 1836, ch. 54, 5 Stat. 10, 15 (establishing Wisconsin territory); Act of June 12, 1838, ch. 96, 5 Stat. 235, 237 (establishing Iowa territory); Act of Aug. 12, 1848, ch. 177, 9 Stat. 323, 325 (establishing Oregon territory); Act of Mar. 3, 1849, ch. 121, 9 Stat. 403, 405 (establishing Minnesota territory); Act of Sept. 9, 1850, ch. 49, 9 Stat. 446, 449 (establishing New Mexico territory); Act of Sept. 9, 1850, ch. 51, 9 Stat. 453, 454 (establishing Utah territory); Act of Mar. 2, 1853, ch. 90, 10 Stat. 172, 175 (establishing Washington territory); Act of May 30, 1854, ch. 59, 10 Stat. 277, 279 (establishing Nebraska and Kansas territories); Act of Feb. 28, 1861, ch. 59, 12 Stat. 172, 174 (establishing Colorado territory); Act of Mar. 2, 1961, ch. 83, 12 Stat. 209, 211 (establishing Nevada territory); Act of Mar. 2. 1861, ch. 86, 12 Stat. 239, 241 (establishing Dakota territory); Act of Feb. 24, 1863, ch. 56, 12 Stat. 664, 665 (establishing Arizona territory with same powers as New Mexico territory); Act of Mar. 3, 1863, ch. 117, 12 Stat. 808, 810 (establishing Idaho territory); Act of May 26, 1864, ch. 95, 13 Stat. 85, 88 (establishing Montana territory); Act of July 25, 1868, ch. 235, 15 Stat. 178, 180 (establishing Wyoming territory); Act of May 2, 1890, ch. 182, 26 Stat. 81, 84 (establishing

Columbia points out in its brief, the delegation of legislative authority under the D.C. Self-Government act, *see* D.C. Code § 1-204, quoted *infra*, is virtually identical to that in the District's Organic Act of 1871, ch. 62, 16 Stat. 419, 423, and substantially like the legislative powers of the territorial governments. *See supra* note 11 and *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 105 (1953) (analogizing the delegation of legislative power under the Act of 1871 to similar grants to territorial governments).

The significance of these delegations, as the District points out, arises from the fact that such delegations to subordinate governments of taxing power predated the Constitution, and their continuance by the First Congress clearly demonstrates that the Origination Clause applies only to tax measures to finance the general government.[12] Thus, the purpose of the Origination Clause, relating to the distribution of power within Congress, was to give to the immediate representatives of the people "the primary role in raising revenue" to

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Oklahoma territory); 48 U.S.C. § 1574 (a) (1988) (establishing Virgin Islands territory).

12 *See* Ordinance for the Government of the Territory of the United States north-west of the river Ohio, Art. IV (July 13, 1787) (Northwest Territory), *reprinted in* Act of August 7, 1789, Ch. 8, 1 Stat. 50, 52 n.(a); Act of August 7, 1789, Ch. 8, 1 Stat. 50 (adapting Northwest Ordinance to present Constitution, but making no change in the power of the territorial government to tax). *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) ("[t]he construction placed upon the Constitution by the [First Congress], by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight"); *Cohens v. Virginia*, 19 (6 Wheat.) 264, 418 (1821) ("[g]reat weight has always been attached, and very rightly attached, to contemporaneous exposition"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 352 (1816) (paying special attention to contemporaneous interpretation of the Constitution).

finance the general, federal government.[13] *See United States v. Munoz-Flores*, 495 U.S. 285, 394-95 (1990) (citing THE FEDERALIST No. 58). Consequently, we agree with the District that the grant to citizens of the District of Columbia, who have no voting representative in Congress, of the power to enact local taxes is fully consistent with the Founding Fathers' intention that there would be self-government for citizens of the seat of government. *See* THE FEDERALIST No. 43, at 282 (James Madison) (Paul L. Ford ed., 1898).

The D.C. Self-Government Act provides that:

> Except as provided in §§ 1-206, 1-233, 47-313, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the

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[13] The District of Columbia suggests that this was done so as to avoid a chief grievance that led to the American Revolution: taxation without representation. *See* W. BENTON, 1787: DRAFTING OF THE U.S. CONSTITUTION, 741, 781 (1986). This purpose is outlined in THE FEDERALIST No. 58, at 386-87 (Alexander Hamilton) (Paul L. Ford ed., 1898):

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse — that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

> states by the 10th section of the 1st article of the Constitution of the United States.

D.C. Code § 1-204 (Repl. 1992). The chairman of the Senate District Committee, who was also the manager of the bill in the Senate, explained that by this legislation it was intended, with exceptions for taxation of federal property and enactment of an income tax on nonresidents, that the elected Mayor and Council of the District of Columbia "can decide in what way and how much to tax their citizens, can enact local ordinances into law, and can begin to shape their own destiny as should be the right of all American citizens." 119 Cong. Rec. 22947 (1973) (Senator Eagleton).[14]

We reject appellants' argument that because the D.C. Self-Government Act provides the source of the local

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[14] As Judge Doyle pointed out in his opinion at 9, this court has rejected a restrictive view of the delegation of legislative authority under the Self-Government Act while preventing any intrusion by the Mayor and Council into specifically forbidden areas. *Compare District of Columbia v. Greater Washington Labor Council*, 442 A.2d 110, 115 (D.C. 1982) ("transfer by Congress of certain public employment services from United States Department of Labor to the District government, in the absence of a concurrent transfer of private employment work[ers'] compensation . . . does not reflect a congressional intent to prohibit the local government from legislating with respect to private work[ers'] compensation"; former involved federal statute not applicable exclusively to the District of Columbia while latter did), *cert. denied*, 460 U.S. 1016 (1983), *and McIntosh v. Washington*, 395 A.2d 744, 753 (D.C. 1978) (delegated authority extends to all rightful subjects of legislation), *with Bishop v. District of Columbia*, 411 A.2d 997, 998 (D.C. 1980) (en banc) (repeal of professional exemption to the unincorporated business tax and imposition of a tax on nonresident unincorporated professionals and personal service business "was impermissible exercise of the District of Columbia Council's authority under § 602 (a) of the [Self-Government] Act," which included express prohibition of "imposition of any tax on the whole or any portion of personal income . . . of any individual not a resident of the District," D.C. Code § 1-147 (a)(5) (Supp. 1978)), *cert. denied*, 446 U.S. 966 (1980).

government's taxing authority, that law had to originate in the House of Representatives. The term "revenue bill," for Origination Clause purposes, refers only to bills that "'levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue.'" *United States v. Munoz-Flores, supra*, 495 U.S. at 397 (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)) (citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 880, pp. 610-11 (3d ed. 1858)). Consequently, "a statute that creates a particular government program and that raises revenues to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Id.* at 398. In *Twin City Bank v. Nebeker, supra*, 167 U.S. at 202-03, the Supreme Court determined that the test for whether a particular bill is a revenue bill rests upon the bill's "main purpose." *See United States v. Wilson*, 901 F.2d 1000, 1004 (11th Cir. 1990) ("where the purpose of an act is 'to raise revenue to be applied in meeting the expenses or obligations of the government,' the act is a revenue measure subject to the origination clause. Where the main purpose of the act is other than raising revenue, it is not subject to challenge under the origination clause") (quoting *United States v. King*, 891 F.2d 780, 781 (10th Cir. 1989)).

The D.C. Self-Government Act is not a "revenue bill" within the meaning of the Origination Clause. Generating revenue for the United States government and its operations was clearly not its "main purpose." Rather, the principal purpose of the Self-Government Act was to provide a measure of self-government for the citizens of the District of Columbia by creating a representative form of local government. *See* S. REP. No. 93-219, 93d Cong., 1st Sess. 1 (1973) ("[t]he purpose of [the Self-Government Act] is to enact a District of Columbia Charter Act and thereby restore to the citizens of the District of Columbia some measure of self-government"); D.C. Code 1-201 (a) (Repl. 1992) ("the intent of Congress is to delegate certain legislative powers to the government of the

District of Columbia, . . . and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters"). Revenues derived from a tax enacted by the Mayor and D.C. Council pursuant to the authority delegated under the Self-Government Act are not generally available for defraying the expenses and obligations of the United States government in connection with its national responsibilities and activities, but are for use by the government of the District of Columbia in support of the activities of the local government.[15] *See* D.C. Code § 47-301 (a)(1) (Repl. 1990). Any support of national activities is purely "incidental." *See United States v. Munoz-Flores, supra*, 495 U.S. at 399.[16] Since the principal purpose of the Self-Government Act was not to raise revenues for the general government, it could not have been enacted in violation of the Origination Clause. *Id.*

Nor does the 1987 Act, a bill for raising revenue for the District of Columbia, violate the Origination Clause because it did not originate in the House. A contrary holding would

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[15] Generally, in states that have such provisions in their state constitutions, laws delegating authority to local government units to levy and collect taxes for local purposes are not considered bills for "raising revenue" within the meaning of the Origination Clause. *See* F.G. Madara, Annotation, *Application of Constitutional Requirement That Bills for Raising Revenue Originate in Lower House*, 4 A.L.R.2d 973, 984-86 (1949) (citing *Rankin v. Henderson*, 7 S.W. 174 (1888)).

[16] Appellants rely on the statement in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 221 (1989), that "the Origination Clause . . . implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power *once a tax bill has been properly enacted*" (emphasis added). But *Skinner*, which merely applied the familiar standard for congressional delegation of authority to an administrative agency, has nothing to say about the authority of Congress, consistent with the Constitution, to delegate broad governmental authority — including the power to tax for local purposes — to territorial and other subordinate entities such as the District of Columbia government.

ignore the purpose of the Origination Clause, described above, and the history of delegations of taxing authority to the territorial and local District of Columbia governments. In *Milliard v. Roberts*, 202 U.S. 429 (1906), the Supreme Court held that an act of Congress originating in the Senate that taxed District of Columbia land to carry out public improvements in the District was not a "revenue bill" within the meaning of the Origination Clause, but rather the "means to the purposes provided by the act." *Id.* at 437. The act at issue in *Milliard* was clearly a District of Columbia tax to which appellants presumably would argue the Origination Clause applies; but the Supreme Court held otherwise. Like the statute in *Milliard*, the taxing authority delegated to the District of Columbia is merely the means by which the District government is to carry out its self-governing, not a means to raise revenues for the United States. The Origination Clause simply does not apply to tax measures enacted pursuant to a delegation by Congress of taxing powers to the District or similar governments to carry out their local government functions.

Appellants maintain in their Reply Brief that whether the 1987 Act violates the Origination Clause "may come down to exactly what taxing authority the Congress intended to delegate to the D.C. Council." They posit that Congress did not intend to give the District of Columbia "carte blanche" taxing authority under D.C. Code § 1-204, and that the general language of § 1-204 does not apply to a matter, in this case taxing authority, specifically dealt with in another part of the same statute. Appellants suggest that Congress made known its true intent regarding taxing authority by specifically granting authority over existing real and personal property taxes (§ 47-501), and changes in the rates of taxes previously enacted by Congress (§ 47-504) in other provisions of the Self-Government Act, now codified in Title 47 (Taxation and Fiscal Affairs). We disagree.

First, because § 1-204 was enacted in connection with a fundamental reorganization of the District government and is

a broad delegation of legislative authority occurring after the enactment of § 47-501 and § 47-504, the general language of the Self-Government Act controls the language of legislation that preceded it. The limitations on the District government's taxing authority under the Self-Government Act are expressly stated in the Self-Government Act. *See* 1 D.C. Code at 226-27 (Repl. 1991) (§ 602 of the Self-Government Act, codified as D.C. Code § 1-233); *cf. McIntosh v. Washington*, *supra* note 14, 395 A.2d at 754 (if Congress had intended to limit the broad grant of legislative authority under the Self-Government Act, it would have so stated in the statute or legislative history).[17] The provisions of § 47-501 and § 47-504 were simply modified by the codifiers following the enactment of the Self-Government Act, to refer to the new, elected Council of the District of Columbia. *See* D.C. Code §§ 47-501 (codifier's notation "Change in government"); -504 (same). On their face, § 47-501 and § 47-504 do not preclude any other taxation by the District of Columbia.

Second, volume 11 of the D.C. Code (Repl. 1990) lists the provisions of the D.C. Self-Government Act codified in Title 47 of the D.C. Code. A review of those provisions indicates that they pertain to the District's budget process, the general fund, the issuance of general obligation bonds and revenue bonds, borrowing, and audits by the General Accounting Office. These provisions place no limitation on the District's taxing authority under the Self-Government Act. In addition, § 47-501 and § 47-504, mentioned specifically by appellants, chronologically preceded enactment of the Self-Government

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[17] Thus, appellants' reliance on *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 228-29 (1957), is misplaced because in that case, unlike the fundamental governmental restructuring and broad delegation of authority under the Self-Government Act, the Court's conclusion about the statute regarding venue for patent infringement claims rested on the absence of a substantive change in the statute at issue and of an alteration to the scope and purpose of the enactment of the statute. 353 U.S. at 225, 227.

Act and therefore cannot be read as having any effect on the delegation of legislative authority under D.C. Code § 1-204.

Third, to adopt appellants' argument would contradict the statutory scheme of the Self-Government Act, premised in part on the requirement that the District government present a balanced budget to Congress, supported by necessary revenue measures. *See* 1 D.C. Code § 442 (a)(1) at 202-203 (Repl. 1991), codified as D.C. Code § 47-301 (a)(1)).

Therefore, appellants' challenges to the delegation of taxing authority by the Self-Government Act and to the 1987 Act itself as violative of the Origination Clause must fail.

III.

Appellants' primary contention, however, is that the 1987 Act, by combining the gross receipts tax with exemptions and credits against personal property and certain sales and use taxes only when the latter are paid to the District of Columbia, impermissibly discriminates against long-distance telephone carriers not based in the District of Columbia, in violation of the Commerce Clause of the United States Constitution. Under the 1987 Act, a long-distance carrier is exempt from the District of Columbia's personal property tax, and certain sales and use taxes, to the extent that the carrier's property in the District of Columbia is used to produce gross receipts subject to the 1987 Act.[18] When, by con-

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[18] The 1987 Act provides exemptions for the following personal property tax, and sales and use taxes, from the gross receipts tax imposed:

> The personal property of any telecommunications company . . . used or consumed in furnishing a service if the receipts from furnishing the service are subject to a gross receipts tax in force in the District . . . . D.C. Code § 47-1508 (a)(3)(B) (Supp. 1989);
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> Sales of property purchased by a telecommunication company . . . for use or consumption in

trast, carriers (such as appellants) located outside of the District of Columbia use property to produce revenues subject to the 1987 Act, they receive no offset against the gross receipts tax for personal property, sales, and uses taxes paid to their home jurisdiction.[19]

Appellants contend that the exemptions and credits in the 1987 Act place long distance telephone companies located outside the District at a substantial commercial disadvantage. In their view the tax scheme in the 1987 Act is unconstitutional because "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 282 (1987). We are compelled to agree.

The Commerce Clause, art. I, § 8, cl. 3, authorizes Congress to "regulate Commerce . . . among the several States." Although it is silent about regulation of interstate commerce by States in the absence of Congressional legislation, the Supreme Court has read the Clause as a limit on state power. *See, e.g., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). To ensure "an area of free trade among the

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> furnishing a service or commodity if the receipts from furnishing the service or commodity are subject to a gross receipt tax or mileage tax in force in the District . . . . D.C. Code § 47-2005 (5) (Supp. 1989);
>
> Sales upon which taxes are properly collected under the [District of Columbia Gross Sales Tax provisions] . . . . D.C. Code § 47-2206 (1) (Supp. 1989).

[19] Similarly, to the extent that a long distance carrier located in the District of Columbia uses its property located here to produce revenues outside of the District of Columbia (hence not subject to the District's gross receipts tax), it receives no exemption from other District of Columbia taxes.

several states," the Supreme Court has held that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Id.* at 329 (citations omitted). When a state tax is challenged as constituting a violation of the Commerce Clause, the test employed by the Supreme Court is whether the tax: (1) applies to an activity with a substantial nexus to the taxing state; (2) is fairly apportioned; (3) discriminates against interstate commerce; and (4) is fairly related to services or benefits provided by the states. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1912 (1992); *Goldberg v. Sweet*, 488 U.S. 252, 259-60 (1989). Only the third prong is at issue in this case.[20]

Under the anti-discrimination component of the *Complete Auto, supra*, test, a tax discriminates against interstate commerce if it is "facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 75 (1989). Appellants contend that the taxing and exemption provisions of the 1987 Act, in combination, facially discriminate against carriers located outside the District which generate revenues here, contrary to the requirement of "internal consistency" as applied in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987).

The internal consistency principle was originally applied by the Supreme Court in fair apportionment cases under the Commerce Clause.[21] "The first . . . component of fairness in

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[20] Appellants do not challenge the 1987 Act under the first, second, and fourth prongs of the *Complete Auto Transit, Inc. v. Brady, supra*, test. *See Goldberg v. Sweet, supra*, 488 U.S. at 267-268 (holding that Illinois excise tax satisfied the *Complete Auto* test).

[21] Apportionment analysis requires that once a certain set of activities is determined to constitute a "unitary business," a state

an apportionment formula is what might be called internal consistency — that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business income being taxed." *Container Corp., supra* note 21, 463 U.S. at 169. In *Armco*, however, the Court for the first time extended the principle to a case involving a claim of facial discrimination against interstate commerce. The Court invalidated a West Virginia gross receipts tax which "[o]n its face . . . appear[ed] to" tax a transaction or incident "more heavily when it crosses state lines than when it occurs entirely within the state." 467 U.S. at 642. Specifically, West Virginia's gross receipts tax exempted from its reach receipts from the sale of products manufactured in the State but not otherwise. The State argued that exempting resident manufacturers was necessary to compensate for the fact that they were subject to a manufacturing tax West Virginia also imposed, which was inapplicable to out-of-state manufacturers. In rejecting this argument, the Court carried over to the facial discrimination context the test of *Container Corp., supra* note 21, that a tax "'must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." *Id.* at 644.[22] The forbidden discrimination in *Armco* was revealed by the fact that "[i]f Ohio [where Armco was located] or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — then Armco and others from out of State will pay both a manufacturing tax and a wholesale

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must fairly apportion the income of the business within and outside of the state. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

22 As the Court explained in a later decision, "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute." *Goldberg v. Sweet, supra*, 488 U.S. at 261.

tax while sellers resident in West Virginia will pay only the manufacturing tax." *Id.* It was irrelevant to the Court whether another state *in fact* "imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia," *id.*, for otherwise "the validity of the taxes imposed on each taxpayer would depend on the [tax schemes of the] particular other States in which it operated." *Id.* at 645 (footnote omitted).

The District's 1987 Act, unlike the tax in *Armco*, does not exempt local carriers from the gross receipts tax, but the distinction is immaterial as the Supreme Court soon made clear in *Tyler Pipe*. Originally the State of Washington had imposed a business and occupation (or B & O) tax upon (*inter alia*) wholesale sales within the State, but exempted from this tax persons subject to other forms of the B & O tax such as a manufacturing tax on products made within the State. Anticipating the *Armco* decision, the Supreme Court of Washington invalidated the tax on Commerce Clause grounds.[23] *See Tyler Pipe Indus., Inc., supra*, 483 U.S. at 235-36. The State then legislatively "turn[ed] the B & O tax exemption scheme inside out" by "remov[ing] the wholesale tax exemption for local manufacturers and replac[ing] it with an exemption from the manufacturing tax for the portion of the manufacturers' output that is subject to the wholesale tax." *Id.* at 236 (footnote omitted). This scheme resembles the District's 1987 Act which, while exempting no one from the gross receipts tax on covered toll communications services, provides an exemption from personal property (and other) taxes for District property which generates long-distance receipts subject to the gross-receipts tax.

The Supreme Court in *Tyler Pipe* struck down the State of Washington's new tax exemption as well, finding it "the practical equivalent of the exemption" previously invalidated by

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[23] Indeed, the U.S. Supreme Court in *Armco* took note of the Washington Supreme Court's earlier decision "invalidating a Washington tax scheme identical to that here." 467 U.S. at 645 n.8.

the state Supreme Court (and invalid by implication under *Armco*). *Id.* at 241.

> A person subject to Washington's wholesale tax for an item is not subject to the State's manufacturing tax for the same item. This statutory exemption for manufacturers that sell their products within the State has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*.

Id. at 240. Again the Court applied the requirement of internal consistency, pointing out that Washington's

> multiple activities exemption only operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried out within the State. The exemption excludes *similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State.*

Id. at 246-47 (emphasis added).[24] The State's exemption scheme therefore discriminated against interstate commerce in that "[t]he current B & O tax exposes manufacturing or selling activity outside the State to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt." *Id.* at 248; *see also American Trucking Ass'ns v. Scheiner*, *supra*, 483 U.S. at 286-87 (under test of internal consistency and "our consistent course of decisions in recent years," Court invalidates Pennsylvania lump-sum axle tax, which "exert[ed] an inexorable hydraulic pressure on interstate [truckers] to ply their trade within the State that enacted the measure rather than 'among the several States'").

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[24] As Justice Scalia pointed out in dissent, Washington's "exclusion . . . can only be deemed *facially* discriminatory if one assumes that every State's taxing scheme is identical to Washington's." 483 U.S. at 254 n.1 (Scalia, J., dissenting).

Applying *Armco*, *Tyler Pipe*, and *Scheiner*, we conclude that the tax scheme in the 1987 Act cannot withstand a Commerce Clause challenge. The District of Columbia argues in vain that the 1987 Act is not discriminatory because all carriers with personal property in the District that produces revenues subject to the gross receipts tax receive the same exemptions. This argument is unavailing. The discriminatory consequences of the 1987 Act arise from the circumstance that, if the same limited exceptions existed in every state, then out-of-state carriers would pay more than in-state carriers whenever the former had property subject to their home state's personal property tax but used to produce out-of-state revenues subject to another state's gross receipts tax. The fact that appellants have not shown that the taxing scheme in other jurisdictions would, in fact, create a greater tax burden for them than companies located in the District of Columbia is irrelevant. *See Armco, Inc. v. Hardesty*, *supra*, 467 U.S. at 644; *American Trucking Ass'ns v. Scheiner*, *supra*, 483 U.S. at 285. Also irrelevant is the fact that appellants (except for one carrier which only leases property in the District of Columbia) have received exemptions from the District's personal property tax under the 1987 Act[25] and have not yet shown that, nevertheless, they have been subjected to heavier taxation because of the taxing schemes in other jurisdictions. *See Armco, Inc. v. Hardesty*, *supra*, 467 U.S. at 644-45.[26] The

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25 Judge Doyle found that "[a]ll of the [appellants] except Long Distance Services of Washington, Inc. (which leased capacity) have taken the credit in substantial amounts regarding the taxes which are the subject of the present suit for refund." Opinion of Judge Doyle, *supra*, at 18.

26 Although the District of Columbia argues that its gross receipts tax has historically been considered as in lieu of an ad valorem personal property tax, it does not maintain that the gross receipts tax and limited exemptions under the 1987 Act are valid "compensating taxes"; if it did, that argument would not survive application of the internal consistency principle in any event. *See Armco, Inc. v. Hardesty*, *supra*, 467 U.S. at 642-43, and *Tyler Pipe Indus., Inc.*, *supra*, 483 U.S. at 242-43.

Commerce Clause discrimination arises because the 1987 Act provides only a limited exemption, or credit, to the extent that the company uses personal property in the District of Columbia to produce those receipts. As appellants hypothesize:

> A company which concentrated its property in one state but provided services in many would pay a gross receipts tax on all of its receipts and a personal property tax (and sales and use taxes) on all but a small portion of its personal property. In contrast, a company which spread its property among the several states in proportion to the revenues derived therefrom — thereby becoming essentially equivalent to a "home operator" in each state — would pay a gross receipts tax but would not pay personal property taxes or sales or use tax *anywhere.*

Under *Tyler Pipe, supra,* 483 U.S. at 242-43, 246-48, the District of Columbia may not enact a tax scheme whereby the only company that can fully benefit from the available exemptions is one that sells in the District of Columbia only what it produces there, and does not afford the same benefits to a company outside of the District that sells within it or indeed to a District company that sells outside it. What is missing in the 1987 Act is "a credit to any taxpayer upon proof that the taxpayer has paid a tax in another State on the same [tax base] which triggered the [gross receipts tax under the 1987 Act]." *Goldberg v. Sweet, supra,* 488 U.S. at 256; *see Tyler Pipe Indus., Inc., supra,* 483 U.S. at 249.

By fully endorsing Justice Goldberg's dissenting opinion in *General Motors Corp. v. Washington, supra,* 377 U.S. at 451-62, the Supreme Court has apparently signaled in *Tyler Pipe* its preference for a method of taxation that eliminates all overlapping taxation, in favor of the "'federal free market trade unit.'" *General Motors Corp. v. Washington, supra,* 377 U.S. at 461 (quoting *H.P. Hood & Sons, Inc. v. Du Mond,* 336

U.S. 525, 538 (1949)).[27] On the other hand, the Court is not unanimous about the validity of the restrictive internal consistency principle of *Armco* and its progeny. Some members of the Court have suggested reasons to reexamine the Court's extension of the principle at least to state tax schemes that are not discriminatory on their face as in *Armco*.[28] In any event, the shifting ground is particularly unfortunate for the

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[27] Justice Goldberg endorsed the statement of Justice Jackson in *H.P. Hood & Sons, Inc. v. Du Mond, supra*, 336 U.S. at 538, that the Commerce Clause was designed "to create a 'federal free trade unit' — a common national market among the States; and the Constitution thereby precludes a state from defending a tax on interstate sales on the ground that the State taxes intrastate sales generally." 377 U.S. at 461. Justice Goldberg went on to write that:

> Nondiscrimination alone is no basis for burdening the flow of interstate commerce. The Commerce Clause "does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the States. It is immaterial that local commerce is subjected to a similar encumbrance." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). A State therefore should not be enabled to put out-of-state producers and merchants at a disadvantage by imposing a tax to "equalize" their costs with those of local businessmen [or businesswomen] who would otherwise suffer a competitive disadvantage because of the State's own taxation scheme. The disadvantage stemming from the wholesale sales tax was created by the State itself and therefore the fact that the State simultaneously imposes the same tax on interstate and intrastate transactions should not obscure the fact that interstate commerce is being burdened in order to protect the local market.

Id.

[28] *See Goldberg v. Sweet, supra*, 488 U.S. at 270 (Justice O'Connor, concurring in part and concurring in the judgment); *id.* at 271 (Justice Scalia concurring in the judgment); *Tyler Pipeline*

District of Columbia, which enacted the 1987 Act in response to an upheaval in the telecommunications industry at a time when the internal consistency principle appeared limited to apportionment cases and facially discriminatory tax schemes such as those involved in *Armco*, so that the 1987 Act could reasonably have been held not to discriminate unfairly against interstate commerce. Moreover, this court is not in a position, as was the Supreme Court of the State of Washington upon having its tax scheme overturned in *Tyler Pipe Indus., Inc., supra*, to hold that the invalidation of the tax would be prospective only;[29] the Supreme Court has repudiated such civil prospectivity. *See Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993) (rejecting any view of retroactivity based on a *Chevron Oil* analysis and holding that "full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule") (citing *James B. Bean Distilling Co. v. Georgia*, 111 S. Ct. 1439, 2446 (1991) (holding that no court may refuse to apply retroactively a federal rule of law applied to the litigants)).

Consequently, in order to minimize the need to make refunds, *see Dennis v. Higgins*, 111 S. Ct. 865, 871 (1991) (citing

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Indus., Inc., supra, 483 U.S. at 253 (Justice O'Connor, concurring); *id.* at 254 (Justice Scalia, with whom Chief Justice Rehnquist joins, dissenting); *American Trucking Ass'ns v. Scheiner, supra*, 483 U.S at 198 (Justice O'Connor, with whom Chief Justice Rehnquist and Justice Powell join, dissenting); *id.* at 303 (Justice Scalia, with whom Chief Justice Rehnquist joins, dissenting); *Armco, Inc. v. Hardesty, supra*, 467 U.S. at 646 (Justice Rehnquist dissenting). *See also* Walter Hellerstein, *"Is 'Internal Consistency' Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation,"* 87 MICH. L. REV. 138 (1988).

[29] *See National Can Corp. v. Department of Revenue*, 749 P.2d 1286 (Wash. 1988) (en banc) (upon applying the three factors of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), held that state law did not require refunds and prospective application of *Tyler Pipe Indus., Inc., supra*, was appropriate).

McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18, 31 (1990)), the Council of the District of Columbia would have to enact legislation, consistent with Commerce Clause principles, that, for example, would retroactively grant a credit against the gross receipts tax imposed under the 1987 Act for any personal property taxes paid to other jurisdictions on the same tax base, upon proof by the taxpayer of payment of such taxes to another jurisdiction.[30] *See Harper v. Virginia Dep't of Taxation, supra*, 113 S. Ct. at 2519-20 (dictum). Alternatively, the District government could collect the additional tax from appellants' competitors, or it could do a combination of both. *See McKesson Corp. v. Division of Alcoholic Beverages, supra*, 496 U.S. at 40-41.

Accordingly, because the limited exemptions under the 1987 Act impermissibly discriminate against interstate commerce, the 1987 Act is unconstitutional under the Commerce Clause, and we reverse the grant of summary judgment to the District of Columbia. We do not enter judgment for appellants, however, "because federal law does not necessarily entitle them to a refund," and the District of Columbia may "create[] in hindsight a nondiscriminatory scheme." *Harper v. Virginia Dep't of Taxation, supra*, 113 S. Ct. at 2519-20 (dictum) (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra*, 496 U.S. at 40).

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[30] *See Welch v. Henry*, 305 U.S. 134, 147 (1938) (factors for determining the validity of retroactive taxation). *See also United States v. Hemme*, 476 U.S. 558, 567-71 (1986); *United States v. Darusmont*, 449 U.S. 292 (1981).

FARRELL, *Associate Judge*, concurring: I join the court's opinion entirely and write only to express my view that the internal consistency principle, as a test for identifying forbidden commerce clause discrimination outside the fair apportionment context, should be reexamined. The reasons are essentially those stated by Justice Scalia in part I of his dissent in *Tyler Pipe*. See particularly 483 U.S. at 257-58. As applied here, the internal consistency rule says in effect that, for the District of Columbia constitutionally to adopt the means it has for preventing *double* taxation of local telecommunications carriers, it must provide credits enabling carriers in many instances to escape *any* local taxation based on property located or business conducted in the District. Consider, for example, the carrier having property here that is used to generate telephone charges billable to an address outside the District. Those receipts fall outside the District's telecommunications tax on gross receipts; yet because another state hypothetically might capture them under its similar tax, the District must go further and exempt those receipts from the reach of its personal property or use taxes as well — either that or it must eliminate the exemption relieving locals from paying double taxes (personal property and gross receipts) based on a single transaction. I claim no expertise in commerce clause analysis, but this seems to me unnecessarily formalistic[1] and hard to justify by any generalized fear of balkanization of our nation's tax laws. Before the District must refund the potentially millions of dollars at stake here, it deserves a better explanation than *Tyler Pipe* provides for the invalidity of its tax scheme.

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[1] The Court has said, after all, that there is nothing unconstitutional about "fair encouragement of in-state business," *Armco, Inc.*, 467 U.S. at 645, of which avoidance of double taxation would seem a prime illustration.

District of Columbia Court of Appeals

No. 92-TX-846

SPRINT COMMUNICATIONS COMPANY, CABLE & WIRELESS COMMUNICATIONS INC., METROMEDIA COMMUNICATIONS CORPORATION NEE CSI NEE ITT, METROCOM NEE TMC, REALCOM OFFICE COMMUNICATIONS, INC. NEE CONTEL, ALLNET COMMUNICATION SERVICES, INC., MID-ATLANTIC TELECOM, INC., LONG DISTANCE SERVICE OF WASHINGTON, INC.,
Appellants,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, *et al.*,
Appellees.

TAX 4011-87

[REMAINING PORTION OF CAPTION OMITTED]

On Appeal from the Superior Court of the District of Columbia Tax Division

Before: ROGERS, *Chief Judge*, AND FERREN AND FARRELL, *Associate Judges.*

JUDGMENT

These cases came on to be heard on the transcript of record, the briefs filed, and were argued by counsel. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED by this Court, that the judgments appealed from are reversed.

Per Curiam
For The Court:

/s/ By: William H. Ng
WILLIAM H. NG
Clerk

DATED: MARCH 15, 1994

Opinion Per Curiam.

Concurring opinion by Associate Judge Michael W. Farrell.

ac

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

TAX NO. 4091-88

CABLE & WIRELESS COMMUNICATIONS, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4092-88

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
AT&T COMMUNICATIONS OF D. C., INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4348-89

U. S. SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4349-89

ITT COMMUNICATIONS SERVICES, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4363-90

CONTEL OFFICE COMMUNICATIONS, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4650-90

CABLE & WIRELESS COMMUNICATIONS, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4693-91

ALLNET COMMUNICATION SERVICE, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 5000-91

LONG DISTANCE OF SERVICE WASHINGTON, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

OPINION AND ORDER

Before the Court are cross motions for Summary Judgment. The Petitioners are long distance telephone carriers

asking for judgment declaring the Gross Receipt Tax Amendment Act of 1987 and its accompanying emergency act to be unconstitutional and otherwise invalid and for refund of moneys collected thereunder by the District of Columbia. The Respondent, the District of Columbia asks for affirmance of the Acts and for judgment in its favor.

These cases are the most recent episode in the convoluted tax litigation which has followed AT&T's divestiture of its local operating companies in connection with the antitrust suit *United States v. American Telephone and Telegraph Company*, 552 F.Supp. 131 (D.C.D.C. 1982) aff'd memo 460 US 1001 (1983).

The present issues require a preliminary background review. Prior to the 1984 divestiture a District of Columbia subscriber paid the charge for a long distance call to the Chesapeake and Potomac Telephone Company (C&P) AT&T's wholly owned subsidiary which was the local operating company in the District of Columbia. C & P in turn paid the sum received to AT&T. AT&T computed the share owed to C&P for the part it played in the operation and paid each sum to C&P, a procedure called "the division of revenues." The District of Columbia then taxed C&P on that amount under the gross receipt tax of 1939.[1]

One variety of long distance call constituting a relatively small part of the market, however was not taxed. This concerned calls handled by non affiliated carriers such as Sprint and MCI (called OCC's). These companies paid a charge to C&P for use of its local network in connecting a telephone in the District with an OCC's system. The "access charges" by a Tax Court decision[2] were held not to be within the

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[1] 53 Stat. 1107 Ch. 1352, Title IV No. 2(a) codified in the 1986 Supp. of the D.C. Code at 47-2501. For a description of the procedures followed see footnote 2, *Barry v. American Telephone & Telegraph Co.*, 563 A.2d 1069 (DC App. 1989).

[2] *C&P Telephone Company v. District of Columbia*, Docket No. 1756, Opinion 1000, July 17, 1962 90 WLR No. 175, Aff'd in part *Chesapeake & Potomac Telephone Co.*, 117 US App.DC 21 (1963)(C&P III).

operative term of the gross receipts tax act of 1939 i.e. ". . . gross receipts for the sale of *public utilities services or commodities* within the District of Columbia." Following the 1984 divestiture, the District of Columbia Court of Appeals in *District of Columbia v. Chesapeake and Potomac Telephone Company*, 516 A.2d 181 (D.C.App. 1986) (called hereafter C&P. IV) not only reaffirmed the prior tax court decision but also held that by virtue of the divestiture AT&T's payments to C&P were now free of liability under the 1939 Act. Accordingly the combination of the divestiture and C&P (IV) deprived the District of Columbia of all the funds which had been obtained under the Gross Receipts Tax from AT&T and C&P's division of revenues. The reaction of the District of Columbia City Council was to pass the "Gross Receipts Tax Amendment Act of 1987" with an accompanying emergency act[3]. The new legislation extended the coverage to gross receipts received from the sale of toll communications services that originate from or terminate on telecommunications equipment located in the District and billed to a District telephone. There was no longer any distinction between AT&T and the former OCC's. Gross receipts in respect of any of them were now taxable. The tax was retroactive to July 1, 1986. The carriers promptly filed suit either as plaintiff or intervenor asking for Preliminary Injunction and Declaratory Judgment (Tax Docket 4011-87; CA 10080-87). Since now there was no question of coverage under the statute the thrust of the carriers attack was that the Act is unconstitutional. The charges were canister-like. The violations alleged were of the Commerce Clause, the Due Process Clause, the Origination of Revenue Bills Clause, the Congressional jurisdiction over the District of Columbia Clause and the Supremacy Clause. Violations of the Home Rule Act were likewise charged. On December 3, 1987, Judge Iraline G. Barnes issued a preliminary injunction halting attempts to collect the tax. Appeal was taken therefrom and on October 6, 1988 the District of Columbia Court of Appeals remanded directing the trial Court to file more detailed

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[3] 34 DC Reg. 6536 and 5068-5073; DC Code 47-2501(a)(2)(A) (1988 Supp.)

findings of fact or in the alternative to rule on the merits. The Judge preferred the latter course. After a final hearing Judge Barnes found that the Act violated the Due Process Clause in the imposition of a retroactive tax without adequate notice. She further found that the Act violated the Commerce Clause centrally because it was unapportioned and subjected the taxpayer to double taxation. The Court was not impressed by the argument that the City Council lacked the authority to enact tax legislation. Judge Barnes' Order was dated November 14, 1988. It was appealed and on July 19, 1989 the D. C. Court of Appeals rendered its opinion. The appellate court considered itself in something akin to a "catch 22" situation.[4] Since the plaintiffs had not paid the assessed taxes they were not entitled to pursue the suit under the District's "pay before suit" in tax cases statute[5] unless it had been shown beyond debate that the claims of unconstitutionality were valid. Since the Court did not find such to be the case, jurisdiction over the subject matter was considered lacking. The case was remanded with directions to vacate the judgment. In 1989 the 1987 Tax Act was superceded by the *Toll Telecommunications Act of 1989*, (D. C. Act 8-48; D.C. Code Sections 47-3801 through 3821, 2005, 1508 and 2501). This Act inter alia added provisions crediting taxes paid to other jurisdictions on long distance calls and facilitating means of determining data necessary for computing the tax. Measures of this kind had been found by Judge Barnes as necessary but wanting in the 1987 tax. Late in 1988, AT&T paid the tax and filed a new action for refund. (Tax Docket 4092-88). Seven other carriers followed course, (4091-88, 4348-89, 4349-89, 4363-89, 4650-89, 4693-91, 5000-91). In June of 1991, Judge Emmett Sullivan dismissed all of the previous litigation (Tax Docket 4011-87; CA 10080-87) which had been subject to the appellate remand and direction to vacate. Appeal thereto was noted and the District of Columbia Court of Appeals stetted its considera-

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[4] *Barry v. American Tel.&Tel.*, supra.

[5] DC Code 47-3307, 3303.

tion thereof pending determination of this second clutch of cases. Such posture brings this Court to the pending cross motions for Summary Judgment.

First of all the Court agrees with the parties after a review of the entire record that there is no genuine issue of material fact and that the case depends on resolution of questions of law.

The attack upon the validity of the statute rests on nine claims. These, however, may be found clustered around three major contentions why the carriers should not be required to pay the tax.

The first major contention is that the City Council lacked authority under the Constitution and the Home Rule Act to enact revenue legislation in general and the challenged tax in particular. This is so, plaintiffs argue, because 1) Congress under the Constitution has exclusive legislative jurisdiction over the District and all bills for raising revenue must originate in the House of Representatives; 2) that since long distance calls are interstate the legislation is not "within the district" as required by D.C.Code 1-233 (a)(3); 1-202; and that the statute imposes a tax on the federal government which is specifically prohibited by Article VI, Clause 2 of the Constitution.

The second major claim is that the tax fails to apportion gross revenues from interstate commerce between the several jurisdictions and discriminates against out of state competitors violating both the Commerce and the due process clauses.

The third claim is that the retroactive features of the Act violate the due process clause.

The arguments have been carefully crafted and earnestly pressed but this Court is not persuaded by them.

I

The City Council with approval of the Mayor has the authority to enact proper revenue legislation for the District

of Columbia in general and had the authority to enact the Gross Receipt Tax Amendment of 1987 and the Toll Telecommunications Act of 1989 in particular.

It is manifest that by the Self Government Act of 1973, D.C. Code 1-204 et seq. (called popularly and in this opinion, the Home Rule Act), the delegation of powers was virtually plenary. "The legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of the Act subject to all the restrictions and limitations imposed upon the States by the !0th Section of the first article of the Constitution of the United States." (D.C. Code 1-204).

The limitations on the powers were specifically set forth. As far as the power to tax was concerned, the prohibited areas were the commuter tax and functions or property of the Federal Government (D.C. Code 1-233(A)(3) and (a).

Congressional oversight was provided by requiring the legislation to be laid before the Congress for a period of thirty (30) days prior to its effective date.

There was no question about the intent of Congress in enacting the statute. In the course of debates Senator Thomas Eagleton, chairman of the Senate District Committee and manager of the bill explained:

> "We will find in the bill the right of the City Council and the Mayor to enact into law ordinances relating to taxation, excluding at least two very important things that they cannot act upon: The taxation, of course, of any Federal property is prohibited by the constitution, and we prohibit them from the imposition of an income tax on nonresidents of the District of Columbia. But with those two exceptions, one constitutional and one that we impose statutorily, the City Council and an elected Mayors [sic], elected by the three-quarters of a million people of the city, can decide in what way and how much to tax their citizens, can enact local ordinances into law, and can

begin to shape their own destiny as should be the right of all American citizens."[6]

The D. C. Court of Appeals has endorsed the legislative scheme by sharply preventing any attempt by the Council to intrude into specifically forbidden areas *Bishop* v. *District of Columbia*, 411 A.2d 997 en banc, cert.den. 446 U.S. 966 (1980) while endorsing the broad grant of power and refusing to adopt any restrictive view of the delegation. *District of Columbia* v. *Greater Washington Labor Council*, 442 A.2d 110, cert.den. 460 U.S. 1016.

The argument of the carriers in these premises is that regardless of its intention the Congress was prohibited from delegating the taxing power to the City Council by a combination of the Constitution's Article I, Section 8, Clause 17 which gives the Congress exclusive power to legislate over the District of Columbia and Article I, Section 7, Clause I which provides that revenue measures originate in the House of Representatives. This latter measure followed the seventeenth century British tradition[7] or perhaps one of even earlier orgin that money bills must originate in the House of Commons and not in the House of Lords or the Crown.

The levy of moneys for the crown without the grant of parliament had been a matter of serious contest between the Stuart Kings and the Parliament and was condemned by the Bill of Rights of 1689. Toward the end of that century the House of Commons rejected any attempt by the the House of Lords to assume the power of initiating money bills. The complete means of enforcing this prerogative has always been with the lower house itself simply by refusing to pass the offending upper house bill.[8] No case has been cited suggesting

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[6] 119 Cong.Rec. 22947 (1973).

[7] *Commons, House of*, Vol. 3, New Encyclopedia Britannica, Micropedia p. 494.

[8] For the House of Representatives see 99 Cong.Rec. 1897-98 (March 12, 1953) where the house voted to refuse and return a senate bill making appropriation. For the House of Parliament see the much earlier incident reported by Macaulay in History of England, Book IV, Chapter XIX. "The

[Footnote continued on next page]

that the prerogative of the House of Commons or Representatives had the purpose of preventing the legislatures from delegating local or parochial taxing powers to subordinate institutions. The concept has never prevented such delegations as far as the District[9] or for the territories,[10] where the same considerations apply, are concerned. The lack of au-

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[Footnote continued from the previous page]
land-tax was not imposed without a quarrel between the Houses. The Commons appointed commissioners to make the assessment. These commissioners were the principal gentlemen of every county, and were named in the bill. The Lords thought this arrangement inconsistent with the dignity of the peerage. They therefore inserted a clause providing that their estates should be valued by twenty of their own order. The Lower House indignantly rejected this amendment, and demanded an instant conference. After some delay, which increased the ill-humor of the Commons, the conference took place. The bill was returned to the Peers with a very concise and haughty intimation that they must not presume to alter laws relating to money."

[9] Congress, in incorporating the City of Washington in 1802, gave the municipal corporation "full power and authority to pass all by-laws and ordinances," and the power "to lay and collect taxes." *Act of May 3, 1802 Incorporating the City of Washington*, Section 7, 2 Stat. 195. Ten years later, Congress gave additional power to the city government, "to lay taxes on particular wards, parts or sections of the city, for their particular local improvements." *Act of May 4, 1812 Amending the Charter of Washington*, Section 5, 2 Stat. 721. Shortly thereafter, Congress gave authority to the Levy Court for Washington County for certain enumerated purposes "and all other general county purposes, annually [to] lay a tax on all the real and personal property in the said county." *Act of July 1, 1812 Relative to Levy Court of Washington County*, Section 8, 2 Stat. 771. In later reorganizations of the city and county governments in the District of Columbia, Congress delegated authority to enact tax measures. *See Act of May 15, 1820 Reorganizing the Government of the City of Washington*, Sections 7, 8, 13, 2 Stat. 853 (reprinted D.C. Code Section 1-70 (1981)); *Act of May 14, 1848 Reorganizing the Government of the City of Washington*, Sections 2, 3, 9, 11, 9 Stat. 233 (reprinted at D.C. Code Section 1-70 (1981)); *Act of March 3, 1863 to Define the Powers and Duties of the Levy Court of Washington County*, Sections 3, 4, 12 Stat. 799 (reprinted at D.C. Code Section 1-83 83 (1981)); *Act of February 21, 1871 To Provide a Government for the District of Columbia*, Sections 14, 18, 20, 21, 22, 23, 29, 37, 16 Stat. 419 (reprinted at D.C. Code Section 1-92 (1981)).

[10] Territorial Organic Acts of: *Louisiana*, Section 4 (March 26, 1804, 2 Stat. 283, 284); *Wisconsin* Section 6 (April 12, 1863, 5 Stat. 10, 12-13, *Iowa* Section 6 (June 12 1838, 5 Stat. 235, 237); *Oregon* Section 6 (Aug. 14, 48, 9 Stat. 323, 324); *Minnesota* Section 6 (March 3, 1849, 9 Stat. 4-3.
[Footnote continued on next page]

thority for the argument does not persuade this Court to follow it.

The next argument is that the delegation of taxing power is prevented by Article VI, Clause 2 which provides that a state may not, consistent with the Supremacy Clause, lay a tax directly on the United States and by Section 23(a)(3) of the Home Rule Act which prohibits any act which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District. The argument arises generally out of statements in the record that if the District passed a sales tax as have many of the states enacting telecommunications laws it would find that about half of the intended taxpayers were exempt i.e. the Federal Government, the District Government, Foreign Embassies and chanceries and a number of charitable and educational foundations — hence the need for a gross receipts tax. The carriers adroitly counter by charging that pass-through provisions in reality then mean that the tax is sought to be imposed on the United States as prohibited by the Constitution and the federal function provision of the Home Rule Act. The law however is that the Constitution permits a State to tax the gross receipts of those who do business with the United States, *James v. Dravco Contracting Co.*, 302 U.S. 134, 149, 160, (1937); *Silas Mason* v. *Washington Tax Commission*, 302 U.S. 186, 190, 210, (1937) even if the total reciepts of a contractor are from the United States and the tax will be borne by the Government,

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405); *New Mexico* Section 7 (Sept. 9, 1850, 9 Stat. 446, 449); *Utah* Section 6 (Sept. 9 1850, 9 Stat. 453, 454-55); *Washington* Section 6 (March 2, 1853, 10 Stat. 172, 175); *Nebraska and Kansas* Section 6 (May 30, 1854, 10 Stat. 277, 279); *Colorado* Section 6 (Feb. 28, 1861, 12 Stat. 172, 174); *Nevada* Section 6 (March 2, 1861, 12 Stat. 209 211); *Dakota* Section 6 (March 2, 1861, 12 Stat. 239, 241); *Arizona* Section 2 (same powers as New Mexico Territory) (Feb. 24, 1863, 12 Stat. 664, 665); *Idaho* Section 6 (March 3, 1863, 12 Stat. 808, 810); *Montana* Section 6 (May 26, 1864; Section 13 Stat. 85, 88); *Wyoming* Section 6 (July 25, 1868 Section 6 (May 26, 1864, 13 Stat. 85, 88); *Wyoming* Section 6 (July 25, 1868, 15 Stat. 178, 180); *Oklahoma* Section 6 (May 2, 1890, 26 Stat. 81, 84); *Virgin Islands*, 48 U.S.C. Section 1574(a).

United States, v. *New Mexico*, 455 U.S. 720, 735, 741, (1982). See also, *California State Board of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844, (1989).

Next comes the carriers' claim that the tax legislation is illegal because long distance calls are interstate and the District of Columbia may not "enact any act . . . which is not restricted in its application exclusively in or to the District," D.C. Code 1-233 (a)(3); 1-202. This is too cramped a reading of the Home Rule Act. The Act was intended to delegate to the District the same character of legislative power as that held by a state except where specifically prohibited. And, the legislative history clearly indicates that the "Congress intended in 1-233(a)(3) to withhold from local officials the authority to affect decisions made by federal officials in administrating federal laws that are national in scope as opposed to laws that relate solely to the District of Columbia" *The District of Columbia* v. *Greater Washington Labor Council*, supra. at 116. The limitation of legislation to District purposes cannot be held to prevent the District from enacting the same kind of law as the Illinois statute approved in *Goldberg* v. *Sweet, Direct of Illinois Revenue, et al.*, 488 U.S. 252 (Jan. 10, 1989).

II

The legislation presents no undue burden upon interstate commerce and is not unconstitutional.

The second issue concerns the charges of the carriers that the legislation violated the due process and commerce clauses of the Constitution. The contention was persuasive to Judge Iraline Barnes in Tax Docket 4011-87. The Judge now sitting has the highest respect for his former colleague but notes that two events, occurring well after Judge Barnes' Opinion and Order were docketed, have significantly altered affairs. The first of these is the decision of the United States Supreme Court in *Goldberg* v. *Sweet, Director, Illinois Department of Revenue, et. al.*, supra.; second, the enactment of the Toll Telecomunications Act of 1989 adding two provisions which Judge Barnes had found fatally wanting in the 1987 Act.

Goldberg affirmed the Illinois Excise Tax Act imposing a tax on gross charges of interstate telecommunications which originated or terminated in the state and were charged to an Illinois service address. The case was not simply an addition to the "tangled underbrush" [11] of commerce clause decisions. It was instead an opinion of sharp insight and great clarity. The Court saw that prior decisions in the telecommunications field had been based upon the perception that long distance systems operated through a complex of wires and switchboards bearing a ready analogy for tax purposes to railroad lines and bus routes, whereas modern communication technology actually operated through a complex of satellites, fiber optics, microwave radios, electronic impulses and computerized networks having little if any relationship to older techniques[12].

With this fresh perspective the Supreme Court measured the Illinois statute by the four pronged test it had established in *Complete Auto Transit, Inc.* v. *Brady*, 430 US 274 (1977). Such a procedure is obviously the one to be followed here.

Under *Complete Auto* a state tax will withstand Commerce Clause scrutiny if

> . . . the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to services provided by the state.[13]

Since there is no question about the nexus of the District of Columbia the initial measure is in respect of the second prong, fair apportionment. Apportionment is determined by examining whether a tax is internally and externally consistent.[14] This Court concludes that the D. C. Tax statutes

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[11] *Northwestern State Portland Cement* v. *Minnesota*, 358 US 450, 457 (1987).

[12] *Goldberg* 488 US 254, 255.

[13] *Complete Auto*, 488 US 279.

[14] *Goldberg*, 488 US 261.

of 1987 and 1989 are internally consistent " . . . for if every state taxed only those interstate calls which only charged to an in state service address only one state would tax each interstate call".[15]

"The external consistency test asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in state component of the activity being taxed"[16]

Goldberg then notes that, "we doubt that states through which the calls electronic signals merely pass have a sufficient nexus to tax that call" and "we also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a state to tax a call."[17]

The Court added, "We recognize that if the service address and billing location of a taxpayer are in different States some interstate telephone calls could be subject to multiple taxation. This limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme." "To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation.[18]"

To the present Court the combination of the *Goldberg* opinion and the credit provision of the 1989 Act have destroyed the charge that there is a failure fairly to apportion the tax.

The carriers claim that the Gross Receipts Tax does not withstand scrutiny under the third prong of the *Complete Auto* test. They argue that the Act is fatally discriminatory because it allows for a credit and/or exemption from the District's personal property, sales and use taxes to the extent that property subject to such taxes is used to generate the gross receipts which are subject to tax.

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[15] *Goldberg*, 488 US 261.

[16] *Goldberg*, 488 US 261.

[17] *Goldberg*, 488 US 263.

[18] *Goldberg*, p. 264.

The fault of the argument is that discrimination found to be invidious under the Commerce Clause is that between interstate and intrastate commerce. The third prong of *Complete Auto* exists to ensure that a tax "does not discriminate against interstate commerce." *Complete Auto Transit* v. *Brady*, supra. at 279. "Traditionally applied, the discrimination doctrine demands substantially equal treatment of interstate and intrastate business under the tax laws of a given state." *Shores: State Taxation of Gross Receipts and the Negative Commerce Clause.* 54 Missouri Law Review 555 (1989). The 1987 Act at issue does not discriminate at all between intradistrict and interstate carriers. In fact, the Act is only applicable to interstate carriers. The Act's personal property credit/exemption provision is available to any long distance carrier, regardless of whether it is an intradistrict or an out-of-state company, insofar as it owns property in the District which is used to generate gross receipts.

Neither is the nature of the matter changed by referring to the Manufacturing/Wholesaling Acts of West Virginia and Washington treated in *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984) and *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, 483 U.S. 232 (1987). In these cases, companies manufacturing and selling within state were taxed at a lower rate than those companies manufacturing instate and selling out-of-state or manufacturing out-of-state and selling instate. The statutes involved were facially and practically discriminatory statutes paralyzing interstate commerce and favoring local transactions. The 1987 Gross Receipts Act is facially neutral. *Every* long distance carrier owning property in the District of Columbia is subject to a personal property tax imposed by the District and *every* long distance carrier is entitled to a credit/exemption to the extent that his personal property is used to produce gross receipts. Those companies who do not own property in the District are not only unable to avail themselves of the personal property exemption/credit, but they are also free from all personal property taxes in the District of Columbia. All of the Petitioners except Long Distance Services of Wash-

ington Inc. (which leased capacity) have taken the credit in substantial amounts regarding the taxes which are the subject of the present suit for refund. "Such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business." *Armco, Inc.* v. *Hardesty*, supra. at 645. This credit has been preserved on the taxes against the telephone companies from the original Gross Earnings Tax of 1902 through the Toll Telecommunication Act of 1989.

Finally, the fourth and last prong of the *Complete Auto* test is whether the tax is fairly related to services provided by the taxing state. "Beyond the threshold requirement, the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of State tax burden." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981) (quoting *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1939). The District of Columbia provides many municipal services which are accessible to the long distance companies. Telephone company employees drive to and from work on the District's roads, the water system is available for their use, and in the event of an emergency, the District's police and fire squadrons stand ready to come to their aid. The carriers are able to avail themselves of all the amenities that the nation's capitol has to offer and the gross receipts tax represents their "just share" of the tax burden.

III

The retroactive features of the tax statutes are constitutionally permissible and are valid. The feature complained of by the companies in this respect is that the act at issue was passed July 17, 1987 with its emergency act effective that date and the permanent act effective October 1, 1987, both retroactive to July 1, 1986.

Retroactivity in legislation often renders it constitutionally suspect. However, tax statutes are a separate and distinct

category. For example, Valid Retroactive Income Tax laws (as distinguished from gift taxes) are more often the rule than the exception and though the claim of " 'arbitrary retroactivity' may continue . . . to rear its head in tax briefs but for practical purposes, in this field, it is as dead as wager of law."[19] Both sides in this case have advised that the law in this area has best been expressed by the opinion of Mr. Justice Stone in *Welch* v. *Henry*, 305 U.S. 134 (1938), though they differently interpret it.

One of the crucial passages of *Weich* recites as follows:

> The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. *Milliken* v. *United States*, 283 U.S. 15, 21; and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.
>
> In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. *Nichols* v. *Collidge*, 274 U.S. 531, 542; *Untermeyer* v. *Anderson*, 276 U.S. 440, 445 (citing *Blodgett* v. *Holden*, 275 U.S. 142, 147); *Coolidge* v. *Long*, 282 U.S. 582. Since, in each of these cases, the donor might freely have chosen to

[19] Ballard: Retroactive Tax Legislation, 48 Harvard Law Review 592 (1935); See also, Hochman: The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harvard Law Review 692, 706 (1960).

> give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy. *Milliken* v. *United States*, supra. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

In analyzing the 1987 tax to determine whether it is unconstitutionally "harsh and oppressive" it must be noted that the District had a compelling reason to act. A loss in tax revenue of 23.6 million dollars had developed between the divestiture of January, 1984 and July of 1986 which other taxpayers had to bear.[20] It does not appear to this Court so unreasonable or oppressive when the Emergency Act accompanying the 1987 Tax Act became effective as of July, 1987 to apportion the burden for the preceding tax year to the Carriers. The interval was no longer than the tax approved in *Welch* and in many of the cases collected by Mssrs. Ballard and Hochman in their articles cited supra.

The Petitioners here argue that they are entitled to the same tests as were the gift taxpayers mentioned in *Welch*, i.e. to notice of the impending tax and sufficient time to take measures to avoid it. This Court holds that the true test for the Petitioners is the Income Tax Test i.e. whether the tax is unconstitutionally harsh and oppressive. Assuming arguendo, however that the Gift Tax test is applicable the carriers position is not improved. Circumstances can provide

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[20] The District had to refund 14.7 million dollars from gross receipts collections from the period January 1984 through June 1985 and 8.9 million uncollected from July 1985 through June 1986. Report of Committee on Finance and Revenue on Bill 7-186, Gross Receipts Tax Amendment Act of 1987 at 8. D.C. Exhibit #15 at 920.

notice, *United States* v. *Darusmont*, 449 U.S. 292 (1981). The carriers have either been parties to or have been significantly affected by an avalanche of litigation related to the revolution in the telecommunications industry.[21]

Armed with this litigation experience it was certainly reasonable for the industry to foresee as did Judge Nebeker in C&P IV that a new tax to halt the substantive loss of revenue was inevitable.[22] Also with the failure of the tax on the local operating company (C&P) and the predisposition of the District to the Gross Receipts Tax it was certainly foreseeable that such a tax would be levied on the Long Distance Carriers covering as great a time interval as would legally be possible. The claim that if they had only known of the pendency of the tax the carriers would have closed their business in the District or would have exercised some undetailed organizational manuever to avoid the tax is not attractive. An examination of the size of the carriers' gross receipts in the Kerwin Affadavit[23] and the words of *Welch* (p. 148) "We cannot assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would be subject to a new tax or an increase in an old one." provide answer to this claim.

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[21] e.g. The drive by the OCC's to enter the market. (*Bell System Tariff Offering of Local Distribution Facilities for Use by other Common Carriers*, 46 FCC2d 413 aff'd sub nom *Bell Telephone Co.* v. *FCC*, 503 F2d 1250 (1974) cert. den. 422 U.S. 1026; *MCI Telecommunications v.* FCC 180, 188 U.S.App.D.C. 327, 580 F.2d 590, cert. den. 439 U.S. 980 (1978)); the break up of the Bell System (*United States* v. *AT&T*, supra) and the tax cases governing the industry (C&P III and C&P IV, supra, *Chesapeake and Potomac Telephone Co.* v. *District of Columbia*, 78 U.S.App.D.C. 53, 137 F.2d 674 (1943) called here C&P I and *Chesapeake and Potomac Telephone Co.* v. *District of Columbia*, 86 U.S.App.D.C. 124, 179 F.2d 814 (1950) called here C&P II.

[22] "We hasten to note however that the significant structure changes in the telephone industry resulting from the divestiture of AT&T (citing cases) render the tax consequences of those changes appropriate for legislative consideration." C&P IV at p. 82.

[23] Affadavit of supervising auditor Kerwin attached to the motion of the District of Columbia for Summary Judgment.

The final and most subtle argument in this set is that principles of public utility law prohibiting retroactive rates or surcharges render the retroactive portion of the tax between the dates new tariffs might have been filed and July 1, 1986 to be invalid.

The authorities do indeed support the proposition that a public utility may not set rates to recoup past losses nor may a carrier recover from its ratepayers past deficiencies in rates citing *Nader* v. *FCC*, 172 U.S. App. D.C. 1, 20, 520 F.2d 182, 202 (1975, citing *Galveston Electric Co.* v. *Galveston*, 258 U.S. 388 (1922), *Washington Gas Light Co.* v. *Baker*, 88 U.S. App. D.C. 115, 188 F.2d 11 (1950), *Williams* v. *WMATC* 134 U.S. App. D.C. 342, 415 F.2d 922 *cert. den.* 393 U.S. 1081 (1969). Taxes however are not a loss. They are ". . . neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government. . . ." *Welch* at p. 146. They are instead operating costs and "there is no difference in this respect between state and federal taxes or betwen incomes taxes and others." *Galvestion Electric Co.* v. *Galveston*, *supra* at 399. All parties here seem to agree that the "pass-through" method is not feasible but they differ upon the suitability of the raising of rates. The answer to this is that before the present court is the question of the validity of a tax and not the solution to a rate case. The correct fora to determine the latter are the Federal Communications Commission and the United States Court of Appeals for the District of Columbia Circuit.[24] Retroactive rates have certainly been disallowed in many circumstances but not always. *Bell Telephone Company of Pennsylvania* v. *Federal Communications Commission, et al.*, 245 U.S.App.DC 386, 761, 789 F.2d (See the number of occasions when amortization has been approved for regulatory expenses, obsolete property, acquisition adjustments, inflation, and acceleration of income tax depreciation.)[25] There has been here no reference to any attempt by

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[24] Communication Act of 1934, 47 U.S.C.A. #204, 204.

[25] 1 Priest, Principles of Public Utility Regulation Ch. 3 "Elements of Rate Making."

the petitioners to seek an adjustment by the FCC of the tax difficulties created by the break-up of the Bell System and this Court will not presume that such is impossible. The Court's task is to determine the validity of the 1987 tax and it holds the Act constitutional and valid.

IV.

Conclusion

Any other points raised by the Plaintiffs the Court considers peripheral to matters decided above and if not they are considered and found unpersuasive.

For the reasons as aforesaid the Court finds that the Respondent the District of Columbia is entitled to grant of its Cross-Motion for Summary Judgment and further finds that the Petitioners' motions for Summary Judgment must be denied.

ORDER

The Court having before it the cross motions for Summary Judgment of the above captioned parties and having found that there exists in the premises no genuine issue of material fact and that the Respondent, the District of Columbia, is entitled to judgment as a matter of law, now therefore the cross motions of the Respondent for Summary Judgment is hereby GRANTED and the motions of Petitioners and each of them for Summary Judgment are hereby DENIED, and it is this 18th day of February 1992

ORDERED that the Respondent, District of Columbia is hereby granted Judgment of Dismissal on the Merits as to each and every petition filed herein, and the aforesaid petitions are dismissed with prejudice.

/s/ By: John F. Doyle

JOHN F. DOYLE,
Senior Judge

cc: William Malone, Esquire
Miller & Holbrooke
1225 - 19th Street, NW, Suite 400
Washington, DC 20036
Attorney for U S Spring, Cable & Wireless and Metromedia Communications nee CSI nee ITT

John M. Wood, Esquire
Reed Smith Shaw & McClay
1200 - 18th Street, NW
Washington, DC 20036
Counsel for AT&T

Joseph A. Rieser, Jr., Esquire
Reed Smith Shaw & McClay
1200 - 18th Street, NW
Washington, DC 20036
Counsel for AT&T

Paul M. Tendler, Esquire
Tendler & Biggins
12th Floor
1090 Vermont Avenue, NW
Washington, DC 20005
Counsel for Metrocom nee TMC

Mitchell F. Brecher, Esquire
Dow, Lohnes & Albertson
1255 - 23rd Street, NW, Suite 500
Washington, DC 20037
Counsel for ALLNET

Russell M. Blau, Esquire
Swidler & Berlin
3000 K Street, NW, Suite 300
Washington, DC 20007-3841
Counsel for Mid-Atlantic and LDS of Washington

Eric F. Facer, Esquire
Zuckerman, Spaeder, Goldstein,
Taylor and Kolker
1201 Connecticut Avenue, NW
Washington, DC 20036
Counsel for CONTEL nee Realcom

Charles R. Wunsch, Esquire
United Telecommunications, Inc.
KSWESALK
Westwood, Kansas 66205

John Payton, Esquire
Corporation Counsel, D. C.

Julia L. Sayles, Esquire
Assistant Corporation Counsel, D. C.
Chief, Finance Section
Community Development Division
51 N Street, NE, Room 310
Washington, DC 20002

Arlene L. Robinson, Esquire
Acting Deputy Corporation Counsel, D. C.
Community Development Division

Edward E. Schwab, Esquire
Assistant Corporation Counsel, D. C.
Appellate Division

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-1482

MARION S. BARRY, JR., *et al.*, APPELLANTS,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY and AT & T COMMUNICATIONS OF WASHINGTON, D.C., INC., APPELLEES,

and

No. 88-1483

DISTRICT OF COLUMBIA, *et al.*, APPELLANTS,

v.

U S SPRINT COMMUNICATIONS COMPANY, *et al.*, APPELLEES,

and

No. 88-1535

AMERICAN TELEPHONE & TELEGRAPH COMPANY and AT & T COMMUNICATIONS OF WASHINGTON, D.C., INC., CROSS-APPELLANTS,

v.

MARION S. BARRY, JR., *et al.*, CROSS-APPELLEES,

and

[1517-A]

No. 88-1537

U S SPRINT COMMUNICATIONS COMPANY, *et al.*,
CROSS-APPELLANTS,

v.

MARION S. BARRY, JR., *et al.*, CROSS-APPELLEES.

Appeals from the Superior Court of the
District of Columbia

(Hon. Iraline Green Barnes, Trial Judge)

(Argued March 29, 1989 Decided July 18, 1989)*

Edward S. Schwab, Assistant Corporation Counsel, with whom *Frederick D. Cooke, Jr.*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellants/cross-appellees.

Julia L. Sayles, Assistant Corporation Counsel, and *Pastell Vann*, Assistant Corporation Counsel, entered appearances for appellants/cross-appellees.

John M. Wood, with whom *Joseph A. Reiser, Jr.*, was on the brief for appellees/cross-appellants American Telephone & Telegraph Company and AT & T Communications of Washington, D.C., Inc.

William Malone, with whom *John F. Noble*, was on the brief, for appellees/cross-appellants U S Sprint Communications Company Ltd. Partnership, ITT Communications Services, Inc., and Cable and Wireless Communications, Inc.

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* The decision in this case was released this date.

Paul M. Tendler entered an appearance for appellee/cross-appellant TMC Long Distance of Washington Incorporated.

Mitchell F. Brecher entered an appearance for appellee/cross-appellant Allnet Communications Services, Inc.

Andrew D. Lipman and *Russell M. Blau* entered appearances for appellees/cross-appellants Mid Atlantic Telecom, Inc., Long Distance Service of Washington, Inc., and Contel Office Communications, Inc.

Craig T. Smith and *Patrick E. McMahon* entered appearances as of counsel for appellee/cross-appellant U S Sprint Communications Company.

Sandra K. Kincaid entered an appearance as of counsel for appellee/cross-appellant ITT Communications & Information Services, Inc.

Before MACK, NEWMAN and BELSON, *Associate Judges.*

NEWMAN, *Associate Judge*: The District of Columbia, *et al.* (the District) appeal a declaratory judgment entered by the Tax Division of the Superior Court that the Gross Receipts Tax Amendment Act of 1987 and its companion bill, the Gross Receipts Tax Amendment Emergency Act of 1987, which impose a retroactive and prospective tax on the sale of telecommunications services originating from or terminating on equipment located in the District of Columbia, are unconstitutional.[1] On cross-

[1] While these appeals were pending, the Council for the District of Columbia enacted new telephone tax legislation in response to the adverse ruling below and the Supreme Court decision in *Goldberg v. Sweet*, 109 S. Ct. 582 (1989), a case upholding the constitutionality of an Illinois excise tax on interstate telecommunications. 36 D.C. Reg. 1911-20 (1989);

appeal, American Telephone & Telegraph Co. and U S Sprint Communications Company, *et al.* (collectively referred to as the Carriers) request that the decision below be affirmed insofar as it holds the Acts unconstitutional and reversed insofar as it rejects their claims that the Acts are unconstitutional on other grounds. Although the constitutional issues may be inviting, we are barred from reaching them under our so-called anti-injunction statute, which provides that "[n]o suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees of any tax." D.C. Code § 47-3307 (1987). Therefore we reverse and remand with instructions to vacate the trial court's declaration of unconstitutionality.

I.

This litigation indirectly springs from the divesture of American Telephone and Telegraph Co. (AT & T) in January 1984. The new relationships which evolved among the telecommunications companies operating in the District of Columbia following the divestiture changed significantly the implications and application of the District's gross receipts tax scheme, including a substantial reduction in taxable revenues. The District's attempt to adjust to the post-divestment realities of the telecommunications

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see Toll Telecommunications Service Tax Emergency Act of 1989, D.C. Act 8-2, 36 D.C. Reg. 1892-1903 (1989) (emergency legislation effective March 1, 1989, for a period of ninety-days) ; Toll Telecommunication Service Tax Temporary Act of 1989, Act 8-14, 36 D.C. Reg. 2375-2386 (1989) (temporary legislation that will take effect after completion of the thirty-day congressional review period and remain in effect for 225 days, during which time the Council will consider permanent legislation).

business by amending the then existing tax laws gave rise to the instant suit.[2]

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[2] Prior to the divestiture, Chesapeake and Potomac Telephone Company (C & P), a wholly owned local subsidiary of AT & T, was the sole provider of both local and long-distance telephone service in the District of Columbia. C & P provided long distance service to its customers through a "payment-for-payment" arrangement with AT & T and other affiliated local telephone companies. Under this arrangement, C & P collected the long-distance charges from its customers and passed the revenues on to AT & T. In turn, C & P received a share of the total long-distance revenues collected by AT & T from all of its subsidiaries. The "division of revenues" which C & P received from AT & T was subject to the District of Columbia's gross receipts tax under D.C. Code § 47-2501 (1981 & Supp. 1988), as payments derived from the sale of public utility services within the District of Columbia. *See Chesapeake & Potomac Tel. Co. v. District of Columbia*, 78 U.S. App. D.C. 53, 54, 137 F.2d 674, 674-75 (1943) (allowing taxation of C & P because it was receiving revenue for public utility services which it rendered for the public).

At the same time, C & P also had arrangements with unaffiliated long-distance telecommuniations carriers (OCC's) for their use of C & P's network access services and local facilities. Under this arrangement, C & P played no part in servicing or billing the OCC's customers. In return for the use of network access services and local facilities, C & P received "access payments" from the OCC's. Unlike the division of revenues C & P received from AT & T, these access payments were exempt from the gross receipts tax because the charges were not derived from the sale of public utility services within the District of Columbia. *See Chesapeake & Potomac Tel. Co. v. District of Columbia*, 117 U.S. App. D.C. 21, 26, 325 F.2d 217, 222 (1963) ("when a public service company supplies services or facilities to another public utility company in the same field for the sole purpose of enabling the latter company to serve its customers more efficiently, such services are not 'public utility commodities

Hoping to recapture the revenues lost by the changes attendant to the divestiture, on July 17, 1987, the Council of the District of Columbia enacted the Gross Receipts Tax Amendment Act of 1987 (Act).[3] 34 D.C. Reg. 5068-73 (1987). Pursuant to the Council's emergency powers, they also passed the Gross Receipts Tax Amendment Emergency Act of 1987, making the provisions of the Act effective as of July 17, 1987, for a period of ninety days, and expiring on October 1, 1987. 34 D.C. Reg. 5275-80 (1987). The Emergency Act made the tax retroactive to July 1, 1986, without any payment being due before October 30, 1987.[4]

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or services,' within the meaning of our statute, and thus are not subject to the gross receipt tax.").

The divestiture ended the payment-for-payment arrangement between C & P and AT & T. Accordingly, in January 1984, C & P began treating payments received from AT & T for the use of its network access services and local facilities as access payments, and excluded those payments from its gross receipts. This tax treatment was eventually upheld in *District of Columbia v. Chesapeake & Potomac Tel. Co.*, 516 A.2d 181, 184 (D.C. 1986).

[3] The District estimated that as of 1986, the exclusion of access charges mandated by this court's decision in *Chesapeake & Potomac Tel. Co., supra,* 516 A.2d 181, resulted in a revenue loss of approximately $23.6 million. Under the Act, the District expected to recoup about $20 million from the retroactive portion of the tax and approximately $18.5 million per year thereafter. *See* D.C. Council Committee on Finance and Revenue, Report on Bill 7-186, "Gross Receipts Tax Amendment Act of 1987," at 7-8 (1987).

[4] The purpose of the emergency legislation was to allocate certain revenues to a prior fiscal year and to provide the Department of Revenue authority and substantial lead time to adopt rules governing collections of revenue under the Act. 34 D.C. Reg. 5275 (1987).

The "permanent" Act became effective on October 1, 1987. The Act amended D.C. Code § 47-2501 (1981) to require telecommunications companies previously exempt from the gross receipts tax to pay a 6.7% tax on the

> monthly gross receipts from the sale of toll telecommunication services that originate from or terminate on telecommunication equipment located in the District and for which a toll charge or periodic charge is billed to an apparatus, telephone, or account in the District, to a customer location in the District, or to a person residing in the District, without regard to where the bill for the service is physically received.

D.C. Law 7-25, § 2, 34 D.C. Reg. 5068 (1987), codified at D.C. Code § 47-2501 (b) (Supp. 1988). The tax is self-executing, that is, every month the companies must file an affidavit with the Mayor setting forth the amount of monthly gross receipts on which payment of the tax is made. D.C. Code § 47-2501 (b) (1) (A) (Supp. 1988). The legislation also created exemptions from the District's personal property, sales and use taxes where the company is also subject to the gross receipts tax, as well as a credit against the gross receipts tax for personal property tax paid to the District during the period of retroactivity, July 1, 1986 through September 30, 1987. D.C. Code §§ 47-2501 (b) (3) (B), (C), -2005 (5) & -2206 (Supp. 1988).

On October 7, 1987, U S Sprint Communications Company, *et al.*, filed an action in the civil division of Superior Court seeking a preliminary injunction, *pendente lite*, to enjoin the District from collecting all taxes under the Act.[5]

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[5] U S Sprint Communications Company (U S Sprint), TMC Long Distance of Washington Incorporated (TMC)

While this action was pending, payments on the prospective and retroactive portions of the tax became due on October 20, 1987 and November 1, 1987, respectively. On or about November 16, 1987, the Department of Revenue issued notices of deficiency assessments to U S Sprint, Allnet, Mid Atlantic, RealCom, Long Distance and Starnet, for failure to pay the tax.[6] The notices informed the companies that enforcement measures to collect the tax would be taken if payments were not received by November 25, 1987. Thereupon U S Sprint, *et al.*, filed an amended complaint and an amended motion for a preliminary injunction. With respect to the complaint, the parties withdrew the prayer for a permanent injunction and instead requested declaratory relief.

On November 24, 1987, American Telephone & Telegraph Company and AT & T Communications of Washington, D.C., filed a motion to stay that was almost identical to the motion for preliminary injunction filed by U S Sprint, *et al.* The following day, the two actions were consolidated and transferred to the Tax Division, where the court orally granted a temporary restraining order on the collection of taxes, but withheld a written order pending a hearing on the merits. After oral argument, on December 3, 1987, Judge Barnes granted the Carriers' motion for a preliminary injunction notwith-

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and Starnet International, Inc. (Starnet) were the original plaintiffs in Civil Action No. 8599-87. Allnet Communication Services, Inc. (Allnet), Cable and Wireless Communications, Inc. (Cable & Wireless), Mid Atlantic Telecommunications, Inc. (Mid Atlantic), Long Distance Service of Washington, Inc. (Long Distance) and RealCom Communications Corp. (RealCom) were permitted to intervene as party plaintiffs on November 10, 1987.

[6] Apparently some of the Carriers filed the requisite affidavits, but none paid the tax prior to commencing this suit.

standing the anti-injunction statute. The court found that equitable relief was warranted in light of the circumstances attendant to the imposition, retroactively, of a new tax enacted as emergency legislation.

This court granted the District's request for an expedited interlocutory appeal on the grant of the preliminary injunction motion and in an Order dated October 6, 1988, we remanded the case after concluding that "the record does not provide a sufficient basis for us to determine the correctness of the trial court's decision." We therefore directed the trial court to make more detailed findings of fact and conclusions of law, or in the alternative, to rule on the merits.[7]

Meanwhile, hearings on the merits had been held and on November 11, 1988, the trial court granted a declaratory judgment. The court concluded that the Act's retroactive and prospective provisions violate the Due Process Clause because of the overly burdensome costs of compliance; that the Act violates the Commerce Clause because it imposes a tax that is unfairly apportioned and not fairly related to the services provided in the District, and that application of the Act's provisions results in double taxation. The District contends that the declaratory judgment should be reversed. The court also found

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[7] In our Order for Remand we asked, *inter alia*:

> What is the factual and legal basis for the trial court's conclusion that this case presents exceptional and extraordinary circumstances so as to warrant injunctive relief, notwithstanding D.C. Code § 47-3307 (1987)? *See District of Columbia v. Green*, 310 A.2d 848 (D.C. 1973); *see also Bob Jones University v. Simon*, 416 U.S. 725, 737 (1974) (injunction may issue only "if it is clear that under no circumstances could the Government ultimately prevail") (citing *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)).

that the Act's tax exemption/credit provisions do not violate the Commerce Clause by discriminating in favor of local business; that Congress' delegation of legislative power to tax is fully consistent with the Origination Clause, and that the Act does not "concern the functions or property of the United States" in violation of D.C. Code § 1-233 (a) (3) (1987). On cross-appeal, the Carriers urge reversal of these findings.[8]

II.

The District argues that D.C. Code § 47-3307 (1987) deprives this court of subject matter jurisdiction because it bars any suit that is filed to enjoin the assessment or collection of a tax by the District of Columbia. Simply put, the District claims that the Carriers, like all other taxpayers, should be required to abide by the "pay first and litigate later" rule, that is, as a condition precedent to challenging the assessment in court, a party must pay the tax. D.C. Code § 47-3307 (1987); *see* D.C. Code § 47-3303; *see also National Trust for Historic Preservation v. District of Columbia*, 498 A.2d 574, 576 (D.C. 1985) (section 47-3307 "precludes equitable relief when there is an adequate remedy at law and ensures that the requirements of D.C. Code § 47-3303, that taxes be paid before they are challenged, is not circumvented.").[9]

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[8] "Our review of the Tax Division's decisions is the same as in other civil cases that are tried without a jury. As to conclusions of law, we will not overturn the trial court's holding unless it is erroneous." *Chesapeake & Potomac Tel. Co., supra*, 516 A.2d at 184 (citations omitted).

[9] There is no dispute that the Carriers have an adequate remedy at law. Upon payment of the tax, the Carriers may obtain judicial review of the assessment:

> Any person aggrieved by any assessment by the District of any [gross receipts tax] . . . or penalties thereon, may

The Carriers do not dispute that they failed to fulfill the jurisdictional requirements of section 47-3307 prior to commencing this action in Superior Court. Rather, the Carriers argue that section 47-3307 does not bar the instant suit because they are seeking declaratory relief and the statute only prohibits suits for injunctive relief. Even if the statute is applicable, the Carriers claim that Judge Barnes was correct in finding that equitable relief is nevertheless warranted because of the exceptional and extraordinary circumstances presented by the case.

Our first task then, is to determine whether the anti-injunction statute applies to declaratory relief as well as injunctive relief. We hold that it does. The generally recognized purpose of an anti-injunctive statute is to prevent disruptions in the flow of tax dollars to the state treasury for government operations and the provision of essential public services.[10] Although it is true that the

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within 6 months after the date of such assessment appeal from the assessment to the Superior Court of the District of Columbia: *Provided, that such person shall first pay such tax together with penalties and interest due thereon to the D.C. Treasurer.*

D.C. Code § 47-3303 (1987) (emphasis added).

[10] *See Allen v. Regents*, 304 U.S. 439, 456 (1938) (Reed, J., concurring) ("The prompt collection of revenue is essential to good government. Summary proceedings are a matter of right. The Government has been sedulous to maintain a system of corrective justice. Any departure from the principle of "pay first and litigate later" threatens an essential safeguard to the orderly functioning of government.") (footnotes omitted); *Bull v. United States*, 295 U.S. 247, 259 (1935) ("taxes are the life-blood of government, and their prompt and certain availability an imperious need."); *Dows v. City of Chicago*, 78 U.S. 65, 66 (11 Wall.) (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is

language of section 47-3307 refers only to suits to "enjoin" the collection of any tax, we reject the Carriers' narrow interpretation of that term to preclude only injunctive relief, for declaratory relief "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended" in the very same manner that an injunction would. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943).

Undoubtedly, declaratory relief may just as well involve a mere declaration of the parties' rights without hampering or restraining the collection of taxes.[11] *Id.* at 299. However, even where declaratory relief involves only a declaration that a tax regulation is invalid, the threat of a lawsuit to enforce that judgment effectively restrains

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of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public."); *see also Maricopa v. Chatwin*, 499 P.2d 190, 197 (Ariz. Ct. App. 1972); *Pacific Gas & Electric v. State Bd. of Equalization*, 611 P.2d 463, 467, 165 Cal. Rptr. 122, 126 (Cal. 1980) (en banc); *District of Columbia v. Keyes*, 362 A.2d 729, 737 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977); *American Can Co. v. McCanless*, 193 S.W.2d 86, 88 (Tenn. 1946).

[11] Clearly, however, that is not the situation here. Although the Carriers would have us look away, we cannot ignore the realities existing outside the fine legal parameters of this case: the Carriers benefited from the protections afforded by the preliminary injunction, *pendente lite*, granted in Judge Barnes' Order of December 3, 1987, which order, of course, was subsumed by the declaratory judgment order of November 11, 1987. *See General Motors Corp. v. Miller Buick, Inc.*, 467 A.2d 1064, 1070 (Md. 1983); *Theis v. San Antonio*, 555 S.W.2d 931, 933-34 (Tex. Civ. App. 1977); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947 (1973).

the government's ability to assess and collect the tax in a manner that is just as coercive as an injunction, though less immediate.[12] In other words, for all practical purposes, the government is equally precluded from assessing and collecting the tax whether it is injunctive or declaratory relief that is granted. In this context then, we fail to see any distinction between the two types of anticipatory relief that warrants dissimilar treatment under section 47-3307.

Furthermore, a contrary construction of section 47-3307 would undermine the purpose of the statute by condoning prepayment interference with the collection of taxes in one context, declaratory relief, and condemning it in another, injunctive relief. We doubt that Congress intended such an arbitrary result. Finally, our interpretation comports with D.C. Code § 47-3303 (1987).[13]

In holding that section 47-3307 applies to declaratory relief, we adopt the position taken by the Supreme Court in *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982), where the Court decided that the federal anti-injunction act prohibited both injunctive and declaratory relief,

> because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax

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[12] "A declaratory judgment is one which determines and declares the rights of the parties without being immediately coupled with a coercive degree." *McIntosh v. Washington*, 395 A.2d 744, 748 (D.C. 1978) (citation omitted).

[13] *See supra* note 9, at 10-11. Section 47-3303 requires taxpayers to pay the assessment before they can challenge it in a suit for a refund.

> officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act.

Id. at 408. Although the principles of comity and federalism played a role in the Court's decision to withhold equitable relief, we do not agree with the Carriers' contention that our analogy to the federal statute is therefore inapt. The tenet disfavoring the issuance of federal injunctions against the collection of taxes by state government evolved from the more universal principle that courts of equity should refrain from interposing equitable relief in cases involving the collection of taxes absent clear proof that there is no adequate remedy at law. *State Railroad Tax Cases*, 92 U.S. 663, 673-74 (1876); *Cheatham v. United States*, 92 U.S. 561, 562-63 (1876); *Dows, supra*, 78 U.S. at 67. For all of the foregoing reasons, we hold that section 47-3307 applies with equal force to bar suits for injunctive and declaratory relief before payment of the challenged assessment.

III.

In light of our determination that section 47-3307 applies to prepayment declaratory relief, the Carriers would urge us to find that declaratory relief is warranted nevertheless because of the "exceptional and extraordinary circumstances" surrounding this case, citing this court's decision in *District of Columbia v. Green*, 310 A.2d 848, 852 (D.C. 1973) (quoting from *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)).[14] Although the language in *Green* guided the

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[14] In *Standard Nut*, the Supreme Court expanded the exception under the federal anti-injunction statute to permit suits to enjoin the collection of the tax where:

> the complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist *special*

decision below,[15] we hold that the proper standard for determining whether equitable relief may be obtained against the collection of any tax requires: 1) a finding that "under no circumstances could the Government ultimately prevail," and 2) that "equity jurisdiction otherwise exists," that is, proof of irreparable injury and inadequacy of the legal remedy. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962); *see, e.g.*,

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> *and extraordinary circumstances* sufficient to bring the case within some acknowledged head of equity jurisprudence . . . .

Supra, 284 U.S. at 509 (citations omitted) (emphasis added).

[15] Judge Barnes first dealt with the jurisdictional issue in her Order of Dec. 3, 1987, granting the Carriers' motion for preliminary injunction. She ruled that:

> [the] facts, coupled with plaintiffs' showing of irreparable harm and injury, its likelihood of prevailing on merit, its strong argument regarding public policy and the lack of an adequate remedy at law demonstrate that the facts and circumstances herein are extraordinary and exceptional warranting equitable relief from this Court.

She addressed the issue again in her Order of January 27, 1988, on the District's motion to dismiss. Citing *Green, supra,* she found that:

> facts before the Court reveal a new and first-time legislation, initially passed as an emergency legislation (Act 7-54) requiring the imposition, retroactively to July 1, 1986, of a gross receipts tax at the rate of 6.7% on certain telecommunications companies engaged in the providing of interstate and foreign toll telephone service. The Act appears to be in response to the historic and significant structure changes in telecommunications resulting from the divestiture of AT & T . . . and the tax consequences of these changes.

Judge Barnes denied the motion; apparently she deemed this novel and historic turn of events sufficiently exceptional and extraordinary to warrant equitable relief.

IRS v. Shapiro, 424 U.S. 614, 627 (1976); *Bob Jones University v. Simon*, 416 U.S. 725, 744-45 (1974); *see also District of Columbia v. Keyes*, 362 A.2d 729, 737 & n.19 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977). Because we find that the Carriers did not meet the first prong of the *Williams Packing* test, we reverse.

The appellants in *Green* challenged the constitutionality of a statute utilizing a "stairstep" approach to increase the overall assessment levels for single-family residential properties. *Supra*, 310 A.2d at 852. Because the "jurisdictional points [were] not pressed with vigor . . . , each of the parties preferring a decision on the merits," the court "simply point[ed] out" that it accepted the trial court's finding of "exceptional and extraordinary" circumstances, and referred to a passage in *Standard Nut*. *See id.* The Carriers urge us now to reply on this language; we decline to do so. The holding in *Green* that the court had jurisdiction was based upon the compelling equities of that particular case. We do not deem the *Green* court's reference to *Standard Nut* to have enunciated a substantive test to be followed thereafter in determining jurisdiction over cases involving injunction against the collection of taxes.[16]

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[16] We note with profound regret that this case marks at least the third time the District of Columbia has briefed the issue of lack of jurisdiction under the anti-injunction statute on appeal, but then has subsequently requested a decision on the merits nonetheless. *See 1776 K Street Associates v. District of Columbia*, 446 A.2d 1114, 1114 n.1 (D.C. 1982) ("While requesting a decision on the merits, 'in the public interest' [the District] ha[s] appropriately noted that suits to enjoin the collection of taxes are prohibited . . . ."); *Green, supra*, 310 A.2d at 852 (the "jurisdictional points are not pressed with vigor here, each of the parties preferring a decision on the merits."). At a minimum, this strategy can lead to inadequate briefing, for example, none of the briefs

This court's subsequent decision in *District of Columbia v. Keyes*, concurred in by the author of *Green*, supports this view and is wholly consistent with our adoption of the *Williams Packing* standard. 362 A.2d at 737; *cf. 1776 K Street Associates, supra*, 446 A.2d at 1117 (Ferren, J., concurring in judgment) (citing *Keyes* on issue of whether equitable relief may be granted). *But see 1776 K Street Associates, supra*, 446 A.2d at 1114 n.1 (citing *Green* for proposition that notwithstanding the anti-injunction statute, equitable relief is warranted in "exceptional and extraordinary circumstances"). In holding that the anti-injunction statute barred the suit because the appellant failed to pay the tax prior to bringing suit, the court determined that injunctive relief "may be granted only in the most *exceptional and stringent* circumstances," citing *Bob Jones University, supra*, 416 U.S. 725, and *Williams Packing, supra*, 370 U.S. 1. *Keyes, supra*, 362 A.2d at 737 n.19 (emphasis added).

Williams Packing unequivocally gutted the "special and extraordinary circumstances" exception created in *Standard Nut* and replaced it with a far more stringent standard which requires the taxpayer to prove that the government has no chance of success on the merits in addition to some irreparable injury. *Supra*, 370 U.S. at 6-7; *see also Commissioner v. Shapiro*, 424 U.S. 614,

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filed in *Green* made note of the fact that *Standard Nut* was overruled in *Williams Packing*. At worst, it requires this court to overlook an express statutory limitation on the exercise of its judicial powers, a request we do not take lightly. *See* the District's Brief at 22 ("The anti-injunction statute is jurisdictional; absent compliance with the prerequisites for suits, the statute completely deprives the courts of jurisdiction, except in extremely narrow circumstances," which the District argued were not present here.).

627 (1976); *Commissioner v. "Americans United" Inc.*, 416 U.S. 752, 758 (1974); *Bob Jones University, supra*, 416 U.S. at 744-45.[17]

IV.

The remaining issue then is whether the Carriers have met the standards of *Williams Packing*. Under the first prong of the *Williams Packing* two-part standard, the taxpayer must show "at the time of the suit" that the government "under the most liberal view of the law and the facts," cannot establish its claim. *Williams Packing, supra*, 370 U.S. at 7; *see Shapiro, supra*, 424 U.S. at 627. In other words we will not look to the outcome below in determining whether the Carriers have met their burden under the first prong.

It is clear beyond a doubt that the Carriers failed to show that under no circumstances could the District have ultimately prevailed.[18] Without deciding the merits, we think that the Carrier's claims of unconstitutionality are "sufficiently debatable to foreclose any notion" that under no circumstances could the District ultimately prevail. *Bob Jones University, supra*, 416 U.S. at 749.

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[17] As the Supreme Court noted in *Bob Jones University*:

> *Standard Nut* was such a significant deviation from precedent . . . Read literally, the Court's opinion effectively repealed the [federal Anti-Injunction] Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded before the Act's passage. The incongruity of this position has not escaped notice. It undoubtedly led directly to the Court's re-examination of the requirements of the Act in *Williams Packing*, the second time the Court has undertaken to rehabilitate the Act following debilitating departures from its explicit language.

Supra, 416 U.S. at 744-45.

[18] *See Goldberg v. Sweet*, 109 S. Ct. 582 (1989).

V.

The "pay and sue" rule is no empty shibboleth, and only in "extraordinary and stringent" circumstances should courts take exception to its dictates. We recognize that our decision gives section 47-3307 almost literal effect, and by so holding may impose substantial hardship on taxpayers here in the District notwithstanding available postenforcement judicial review. To hold otherwise, however, would cause harm far beyond the confines of this case; for if equity is permitted to restrain the collection of taxes as the parties sorted through their respective rights, the burden of meeting the financial shortfall would rest on the shoulders of innocent taxpayers in the form of additional taxes and/or inferior or reduced public services. We believe this is the result the statute is designed to prevent.

Reversed.

TITLE 47

TAXATION AND FISCAL AFFAIRS.

D.C. Code § 47-2501. Gas, electric lighting, telephone and telecommunications companies.

(a) Before the 21st day of each calendar month, each gas, electric lighting, and telephone company that sells public utility services or commodities within the District of Columbia shall:

(1) File an affidavit with the Mayor indicating the amount of its gross receipts for the preceding calendar month from the sale of public utility services and commodities within the District of Columbia; and

(2) Pay to the Mayor 6.7% of these gross receipts.

(b) (1) For the period beginning July 1, 1986, and ending February 28, 1989, each telecommunication company not subject to the tax imposed by subsection (a) of this section shall:

(A) Report by affidavit filed with the Mayor the amount of its monthly gross receipts from the sale of toll telecommunication services that originate from or terminate on telecommunication equipment located in the District and for which a toll charge or periodic charge is billed to an apparatus, telephone, or account in the District, to a customer location in the District, or to a person residing in the District, without regard to where the bill for the service is physically received; and

(B) Pay to the Mayor 6.7% of these gross receipts.

(C) [Added 1989] To prevent actual multi-state taxation of the sale of toll telecommunication service, for the month beginning July l, 1986, and for each succeeding month, any telecommunication company, upon proof that it has paid a properly due excise, sales, use, or gross receipts tax in another jurisdiction on a sale that is subject to taxation under this act, shall be allowed a credit against the tax for the amount paid, but in no event shall the credit permitted under this section exceed the tax imposed under this act.

(2) For each calendar month in the period beginning after September 30, 1987, and ending February 28, 1989, each

telecommunication company shall pay the gross receipts tax imposed by this subsection before the 21st day of the succeeding calendar month. The affidavits for each calendar month shall be filed at the time payment is made or on the 20th day of the succeeding calendar month, whichever is earlier.

(3) (A) For the period beginning July l, 1986, and ending August 31, 1987, the gross receipts tax imposed by this subsection shall be due on October 1, 1987. The tax for this period shall be paid in 2 equal installments before November 1, 1987, and before January 1, 1988. The Mayor may, upon written application made before the date prescribed for payment of the tax, grant a reasonable extension of time for paying the tax whenever good cause exists for the extension. The affidavits for each calendar month of this period shall be filed at the time the first installment payment is made or on October 30, 1987, whichever is earlier.

(B) For the period beginning September 1, 1987, and ending September 30, 1987, the gross receipts tax imposed by this subsection shall be paid before October 21, 1987. The required affidavit shall be filed at the time the payment is made or on October 20, 1987, whichever is earlier.

(C) Each telecommunication company subject to the gross receipts tax imposed by this subsection for the period beginning July 1, 1986, and ending September 30, 1987, shall be allowed a credit against the gross receipts tax imposed by this subsection for the amount of personal property tax that is allocable to the period beginning July 1, 1986, and ending September 30, 1987, and that is paid pursuant to § 47-1501, and subchapter II of Chapter 15 of this title.

(D) [Added 1989] Beginning July 1, 1986, a telecommunication company subject to the tax imposed by this act may be allowed an alternate method of reporting its monthly gross receipts upon showing, to the satisfaction of the Mayor that the telecommunication company does not have the capability to identify the jurisdiction of origination or termination of a particular toll telecommunication service. This showing shall be made by a written petition to the Mayor, which shall include the factual basis for the com-

pany's inability to identify the jurisdiction of origination or termination of a particular toll telecommunication service, with supporting documentation, and an alternative method of reporting for the services for which the company is unable to identify the jurisdiction of origination or termination that the company believes is reasonable and equitable, with supporting documentation. The Mayor may employ a reasonable and equitable alternate method for reporting a telecommunication company's gross receipts from this service based on information submitted pursuant to this subsection or any other information made available to the Mayor. Any alternate method for reporting a telecommunication company's gross receipts that is authorized by the Mayor shall apply only to the service for which the company is unable to identify the jurisdiction of origination or termination and shall not affect the reporting of any other gross receipts. Nothing in this section shall be deemed tc relieve the obligation of a telecommunication company to pay the tax imposed by this act.

(4) Gross receipts from the sale by any telecommunication company of toll telecommunication services for resale to any other telecommunication company subject to the gross receipts tax under this subsection shall be exempt from the gross receipts tax under this subsection.

(5) For purposes of this subsection:

(A) The term "telecommunication company" includes and is not limited to every person, as defined in § 47-2001(i), and lessee of a person who provides for the transmission or reception within the District of Columbia of any form of toll telecommunication service for a consideration.

(B) The term "toll telecommunication service" means the transmission or reception of any sound, vision, or speech communication for which there is a toll charge that varies in amount with the distance or elapsed transmission time of each individual communication; or the transmission or reception of any sound, vision, or speech communication that entitles a person, as defined in § 47-2001(i), upon the payment of a periodic charge, which is determined as a flat amount or upon the basis of total elapsed transmission time,

to an unlimited number of communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area that is outside the local telephone system area in which the station providing this service is located.

(c) Notwithstanding any other provision of law, each gas, electric lighting, telephone company, and telecommunication company subject to the tax imposed by this section shall pay, in addition to the gross receipts tax, the franchise tax imposed by Chapter 18 of this title, the real property tax imposed by Chapter 8 of this title, and the personal property tax imposed by § 47-1501, and subchapter II of Chapter 15 of this title, to the extent provided in § 47-1508.

(d) Before February 1, 1988, the Mayor shall:

(1) Report to the Council on the tax treatment of telecommunication and related services in other jurisdictions; and

(2) Make recommendations as to what, if any, additional telecommunication and related services should be subject to tax by the District.

(e) The Mayor shall issue retroactive and prospective rules necessary to carry out the provisions of this section in accordance with § 1-1506.

(July 1, 1902, 32 Stat. 619, ch. 1352, § 6, par. 5; July 26, 1939, 53 Stat. 1107, ch. 367, title IV, § 2(a); May 18, 1954, 68 Stat. 118, ch. 218, title XIV, § 1401; July 24, 1956, 70 Stat. 599, ch. 669, § 8(a); Oct. 21, 1972, 86 Stat. 1016, Pub. L. 92-518, title III, § 303(a); 1973 Ed., § 47-1701; Oct. 21, 1975, D.C. Law 1-23, title VI, § 501(a)(1), 22 DCR 2105; Sept. 13, 1980, D.C. Law 3-95, § 201(a), (b), 27 DCR 3509; June 22, 1983, D.C. Law 5-14, § 102, 30 DCR 2632; Oct. 1, 1987, D.C. Law 7-25, § 2, 34 DCR 5068; May 23, 1989, D.C. Law 8-4, § 22, 36 DCR 2375; Sept. 20, 1989, D.C. Law 8-26, § 22, 36 DCR 4723.)

D.C. Code § 47-1508. Exemptions [Personal Property Tax]

(a) The following personal property shall be exempt from the tax imposed by this act:

* * *

(3) Any motor vehicle or trailer registered according to §§ 40-101, 40-102, and 40-104 to 40-106, except that special equimment mounted on a motor vehicle or trailer and not used primarily for the transporation of persons or property shall be taxed as tangible personal property as provided by law.

(A) The personal property of any gas, electric lighting, or telephone company regulated under Chapters 1-10 of Title 43, if the gas, electric lighting, or telephone company is subject to a gross receipts tax in force in the District for the period of time or for any portion of the time covered by any return required to be filed by subchapter II of Chapter 15 of this title.

(B) The personal property of any telecommunication company, as defined in § 47-2501 (b) (5) (A), used or consumed in furnishing a service if the receipts from furnishing the service are subject to a gross receipts tax in force in the District for the period of time or for any portion of the time covered by any return required to be filed by subchapter II of Chapter 15 of this title, except that if the personal property is used both to produce receipts subject to a gross receipts tax in the District and receipts not subject to a gross receipts tax in the District, then the personal property tax exemption shall be allocated in accordance with rules issued by the Mayor.

(4) Nothing contained within this act, nor any prior act of Congress relating to the District of Columbia, shall be deemed to impose upon any person, firm, association, company, or corporation a tax based upon tangible personal property owned and stored by the person in a public warehouse in the District of Columbia for a period of time no longer than is necessary for the convenience or exigencies of reshipment and transportation to its destination outside the District of Columbia.

(b) The Mayor shall issue rules necessary to carry out the provisions of subsection (a) (3) (A) and (B) of this section in accordance with subchapter I of Chapter 15 of Title 1. (July 1, 1902, 32 Stat. 620, ch. 1352, § 6, par. 10; Apr. 28, 1904, 33 Stat. 564, ch. 1815; Mar. 4, 1913, 37 Stat. 1006, ch. 150,

§ 10; Sept. 1, 1950, 64 Stat. 576, ch. 836, § 3; May 18, 1954, 68 Stat. 112, ch. 218, §§ 605, 1001, 1002; Sept. 4, 1957, 71 Stat. 606, Pub. L. 85-281, § 6; 1973 Ed., § 47-1208; Feb. 28, 1987, D.C. Law 6-212, § 19(a), 34 DCR 850; Oct. 1, 1987, D.C. Law 725, §3, 34 DCR 5068.)

D.C. Code § 47-2005. Exemptions [Sales Tax].

Gross receipts from the following sales shall be exempt from the tax imposed by this chapter:

* * *

(5)Sales of property purchased by a telecommunication company as defined in § 47-2501 (b) (5) (A), utility, or public-service company for use or consumption in furnishing a service or commodity if the receipts from furnishing the service or commodity are subject to a gross receipts tax or mileage tax in force in the District for the period of time covered by any return required to be filed by the provisions of this chapter. If the property purchase is used both to produce receipts subject to a gross receipts tax or mileage tax in the District and receipts not subject to a gross receipts or mileage tax in the District, then this sales tax exemption shall be allocated in accordance with rules issued by the Mayor.

* * *

D.C. Code § 47-2005. Exemptions [Use Tax].

The tax imposed by this chapter shall not apply to the following:

(1)Sales upon which taxes are properly collected under Chapter 20 of this title;

* * *

D.C. Law 7-25 (October 1, 1987)

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, that this act may be cited as the "Gross Receipts Tax Amendment Act of 1987"

Sec. 2. Section 6(5)of An Act Making appropriations to provide for the expense of the government of the District of Columbia for the fiscal year ending June thirtieth, nine-

teen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 619; D.C. Code, sec. 47-2501), is amended to read as follows:

"(5)(A) Before the 21st day of each calendar month, each gas, electric lighting, and telephone company that sells public utility services or commodities within the District of Columbia shall:

"(i) File an affidavit with the Mayor indicating the amount of its gross receipts for the preceding calendar month from the sale of public utility services and commodities within the District of Columbia; and

"(ii) Pay to the Mayor 6.7% of these gross receipts.

"(B)(i) Beginning July 1, 1986, each telecommunications company not subject to the tax imposed by subparagraph (A) of this paragraph shall:

"(I) Report by affidavit filed with the Mayor the amount of its monthly gross receipts from the sale of toll telecommunication services that originate from or terminate on telecommunication equipment located in the District and for which a toll charge or periodic charge is billed to an apparatus, telephone, or account in the District, to a customer location in the District, or to a person residing in the District, without regard to where the bill for the service is physically received; and

"(II) Pay to the Mayor 6.7% of these gross receipts.

"(ii) For each calendar month beginning after September 30, 1987, each telecommunication company shall pay the gross receipts tax imposed by this subparagraph before the 21st day of the succeeding calendar month. The affidavits for each calendar month shall be filed at the time payment is made or on the 20th day of the succeeding calendar month, whichever is earlier.

"(iii)(I) For the period beginning July 1, 1986, and ending August 31, 1987, the gross receipts tax imposed by this subparagraph shall be due on the date that the Gross Receipts Tax Amendment Act of 1987 takes effect. The tax for this period shall be paid in 2 equal installments before November 1, 1987, and before January 1, 1988. The Mayor

may, upon written application made before the date prescribed for payment of the tax, grant a reasonable extension of time for paying the tax whenever good cause exists for the extension. The affidavits for each calendar month of this period shall be filed at the time the first installment payment is made or on october 30, 1987, whichever is earlier.

"(II) For the period beginning September 1, 1987, and ending September 30, 1987, the gross receipts tax imposed by this subparagraph shall be paid before October 21, 1987. The required affidavit shall be filed at the time the payment is made or on October 20, 1987, whichever is earlier.

"(III) Each telecommunication company subject to the gross receipts tax imposed by this subparagraph for the period beginning July 1, 1986, and ending September 30, 1987, shall be allowed a credit against the gross receipts tax imposed by this subparagraph for the amount of personal property tax that is allocable to the period beginning July 1, 1986, and ending September 30, 1987, and that is paid pursuant to An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 617; D.C. Code, sec. 47-1501), and the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code sec. 47-1521 *et. seq.*).

"(iv) Gross receipts from the sale by any telecommunication company of toll telecommunication services for resale to any other telecommunication company subject to the gross receipts tax under this subparagraph shall be exempt from the gross receipts tax under this subparagraph.

"(v) For purposes of this subparagraph:

"(I) The term "telecommunication company" includes and is not limited to every person, as defined in section 109 of the District of Columbia Sales Tax Act, approved May 27, 1949 (63 Stat. 113; D.C. Code, sec. 47-2001(i)), and lessee of a person who provides for the transmission or reception within the District of Columbia of any form of toll telecommunication service for a consideration.

"(II) The term "toll telecommunication service" means the transmission or reception of any sound, vision, or speech communication for which there is a toll charge that varies in amount with the distance or elapsed transmission time of each individual communication; or the transmission or reception of any sound, vision, or speech communication that entitles a person, as defined in section 109 of the District of Columbia Sale Tax Act, approved May 27, 1949 (63 Stat. 113: D.C. Code, sec. 47-2001(i)), upon the payment of a periodic charge, which is determined as a flat amount or upon the basis of total elapsed transmission time, to an unlimited number of communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area that is outside the local telephone system area in which the station providing this service is located.

"(C) Notwithstanding any other provision of law, each gas, electric lighting, telephone company, and telecommunication company subject to the tax imposed by this paragraph shall pay, in addition to the gross receipts tax, the franchise tax imposed by the District of Columbia Income and Franchise Tax Act of 1947, approved July 16, 1947 (61 Stat. 331; D.C. Code, sec. 47-1801.1 *et. seq.*), the real property tax imposed by the District of Columbia Real Property Tax Revision Act of 1974, approved September 3, 1974 (88 Stat. 1052; D.C. Code sec. 47-801 *et. seq.*), and the personal property tax imposed by An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 617; D.C. Code, sec. 47-1501), and the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code sec. 47-1521 *et. seq.*), to the extent provided in section 6(10) of An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 620; D.C. Code, sec. 47-1508).

"(D) Before February 1, 1988, the Mayor shall:

"(i) Report to the Council on the tax treatment of telecommunication and related services in other jurisdictions; and

"(ii) Make recommendations as to what, if any, additional telecommunication and related services should be subject to tax by the District.

"(E) The Mayor shall issue retroactive and prospective rules necessary to carry out the provisions of this paragraph in accordance with section 107 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1203; D.C. Code, sec. 1-1506.".

Sec. 3. Section 6(10) of An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 620; D.C. Code, sec. 47-1508), is amended as follows:

(a) By designating the existing text as subparagraph (A);

(b) By adding a new sub-subparagraph THIRD (A) to subparagraph (A) to read as follows:

"THIRD(A). The personal property of any gas, electric lighting, or telephone company regulated under An Act making appropriations to provide for the expenses of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and fourteen, and for other purposes, approved March 4, 1913 (37 Stat. 974; D.C. Code, sec. 43-101 *et. seq.*), if the gas, electric lighting, or telephone company is subject to a gross receipts tax in force in the District for the period of time or for any portion of the time covered by any return required to be filed by the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code, sec. 47-1521 *et. seq.*),";

(c) By adding a new sub-subparagraph THIRD(B) to subparagraph (A) to read as follows:

"THIRD(B). The personal property of any telecommunication company, as defined in section 6(5)(B)(v)(I), used or consumed in furnishing a service if the receipts from furnishing the service are subject to a gross receipts tax in force in the

District for the period of time or for any portion of the time covered by any return required to be filed by the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code sec. 47-1521 *et. seq.*), except that if the personal property is used both to produce receipts subject to a gross receipts tax in the District and receipts not subject to a gross receipts tax in the District, then the personal property tax exemption shall be allocated in accordance with rules issued by the Mayor."; and

(d) By adding a new subparagraph (B) to read as follows:

"(B) The Mayor shall issue rules necessary to carry out the provisions of sub-subparagraphs THIRD(A) and THIRD(B) in accordance with Title I of the District of Columbia Administrative Procedure Act, approved October 21 1968 (82 Stat. 1203; D.C. Code, sec. 1-1501 *et. seq.*)."

Sec. 4. Section 128(f) of the District of Columbia Sales Tax Act, approved May 27, 1949 (63 Stat. 115; D.C. Code, sec. 47-2005(5)), is amended to read as follows:

"(f) Sales of property purchased by a telecommunication company as defined in section (6)(5)(B)(v)(I) of An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 619; D.C. Code, sec. 47-2501), utility, or public-service company for use or consumption in furnishing a service or commodity if the receipts from furnishing the service or commodity are subject to a gross receipts tax or mileage tax in force in the District for the period of time covered by any return required to be filed by the provisions of this title. If the property purchased is used both to produce receipts subject to a gross receipts tax or mileage tax in the District and receipts not subject to a gross receipts or mileage tax in the District, then this sales tax exemption shall be allocated in accordance with rules issued by the Mayor."

Sec. 5. Section 216(a) of the District of Columbia Use Tax Act, approved, May 27, 1949 (63 Stat. 127; D.C. Code, sec. 47-2206(I)), is amended to read as follows:

"(a) Sales upon which taxes are properly collected under the District of Columbia Sales Tax Act, approved May 27, 1949 (63 Stat. 115; D.C. Code, sec. 47-2001 *et. seq.*);".

Sec. 6. Applicability.

(a) Sections 2, 3(a), 3(d), and 5 shall apply as of the effective date of this act.

(b) Section 4 shall apply to taxable periods beginning after September 30, 1987.

(c) Section 3(b) and 3(c) shall apply for the personal property tax year, as defined under section 2(5) of the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code, sec. 47-1521 *et. seq.*), or portion of a personal property tax year, occurring after September 30, 1987.

Sec. 7. This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1987 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)).

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No. 93-1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JOHN M. WOOD
*JOSEPH A. RIESER, JR.
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

Attorneys for AT&T Corp. and AT&T Communications of Washington, D.C., Inc.

WILLIAM MALONE
MILLER, CANFIELD, PADDOCK & STONE
1225 19th Street, N.W., #400
Washington, D.C. 20036
(202) 785-0600

Attorney for Sprint Communications Company, L.P., Cable & Wireless, Inc., and LDDS Metromedia Communications Corporation

*Counsel of Record

[Additional Counsel listed on inside cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

MITCHELL F. BRECHER
DONELAN, CLEARY, WOOD & MASER
1275 K Street, N.W.
Suite 850
Washington, D.C. 20005
(202) 371-9500

Attorney for Allnet

PAUL M. TENDLER
TENDLER, GOLDBERG, BIGGINS & GELTZER
1090 Vermont Avenue, N.W.
Suite 1200
Washington, D.C. 20005-4905
(202) 682-9000

Attorney for Metrocom

Of Counsel:

CHARLES R. WUNSCH
SPRINT COMMUNICATIONS COMPANY, L.P.
Mailstop: KSWESA0108
2330 Shawnee Mission Parkway
Westwood, Kansas 66205
(913) 624-8361

ANDREW D. LIPMAN
RUSSELL M. BLAU
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007-3841
(202) 424-7500

Attorneys for Richard J. Rice, Inc.

ERIC F. FACER
ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 778-1801

Attorney for RealCom

COUNTER QUESTION PRESENTED

Where the benefit of the property, sales and use tax exemptions derived from the District of Columbia's gross receipts tax on interstate long distance calls is limited to property which is both (i) within the District and (ii) used by vendors to generate in-District revenues, whether the exemptions violate the Commerce Clause by discriminating against sales into the District by vendors from surrounding states and by discriminating against sales into other states by vendors located in the District.

PARTIES

The Respondents are taxpayers, *i.e.*, long-distance telephone companies subject to the District of Columbia's gross receipts tax. They are: Sprint Communications Company, L.P.; Cable & Wireless, Inc.; LDDS Metromedia Communications Corporation; AT&T Corporation; AT&T Communications of Washington, D.C., Inc.; ALLNET Communication Services, Inc.; Metro Telecommunications Services, Inc.; Metro Telecommunications Services, Inc.; Richard J. Rice, Inc.; and RealCom Office Communications, Inc. The Petitioners are the taxing authorities, *viz.*, the Mayor, the Director of the Department of Finance and Revenue, and the District of Columbia.

RULE 29.1 LIST

Sprint Communications Company, L.P., is a limited partnership owned solely by Sprint Corporation, formerly United Telecommunications, Inc., whose stock is traded on the NYSE. Cable & Wireless, Inc., is a wholly-owned subsidiary of Cable & Wireless, P.L.C., whose stock is traded on the LSE and whose ADRs are traded on the NYSE. LDDS Metromedia Communications Corporation is a wholly-owned subsidiary of LDDS Communications, Incorporated, whose stock is traded on NASDAQ. ALLNET Communication Services, Inc., is a wholly-owned subsidiary of ALC Communications Corporation, whose stock is traded on the American Stock Exchange. AT&T Communications of Washington, D.C., is a wholly-owned subsidiary of AT&T Corp., formerly American Telephone & Telegraph Company, whose stock is traded on the NYSE. Richard J. Rice, Inc. (formerly known as Long Distance Service of Washington, Inc.), Metro Telecom-

munications Services, Inc., and RealCom Office Communications, Inc., are privately held companies.

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On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to the District of Columbia Court of Appeals. The Petition is premature; the case does not present the issue depicted in the Petition; and the question presented is not worthy of the Court's consideration.

COUNTERSTATEMENT OF FACTS

Introduction

This case involves the statutory scheme which the District of Columbia (the "District") adopted in 1987 to tax the receipts from long-distance telephone calls.

Because the District lies wholly within a toll-free local calling area, all long-distance calls are interstate calls.

Under the legislation enacted by the District Council in 1987, a tax was imposed on the gross receipts of the long-distance companies. This new tax was imposed on the revenues of long-distance carriers attributable to long-distance calls which originated or terminated in the District and were charged to a service address there. The District conjoined this gross receipts tax with an exemption for the long-distance carriers from personal property, sales and use taxes imposed on personal property located in the District. However, the District made this exemption available to the carriers only to the extent that they used such personal property to produce in-District revenue which was subject to the new gross receipts tax. To the extent that a carrier used such personal property to produce out-of-District receipts, it was not exempt from such personal property, sales and use taxes; nor was any adjustment made if a carrier used property taxable in another jurisdiction to produce receipts in the District.

Specifically, the applicable statutory provision regarding the personal property tax states that personal property is exempt from such tax if it is:

> used or consumed in furnishing [long-distance] service if the receipts from furnishing the service are subject to a gross receipts tax in force in the District . . . except that if the personal property is used to produce receipts subject to a gross receipts tax in the District and receipts not subject to a gross receipts tax in the District, then the personal

> property tax exemption shall be allocated in accordance with rules issued by the Mayor.

D.C. Code § 47-1508(a)(3)(B) (Supp. 1989). (Appendix to the Petition ("App.") 75a).[1] Provisions accomplishing similar results were also enacted with respect to sales and use taxes. D.C. Code §§ 47-2005(5), 47-2206(1) (Supp. 1989). (App. 76a).

---

[1] The District's new tax scheme was not enacted until July 17, 1987. Implementing regulations were not published in the D.C. Register until September 25, 1987. However, the gross receipts tax was retroactively imposed back to July 1, 1986. Because the statute was retroactive and because personal property taxes are paid in advance, it was too late to provide an exemption for personal property taxes allocable to the retroactive period. (Personal property taxes for the fiscal year ending June 30, 1987 were due in July, 1986; and such taxes for the fiscal year ending June 30, 1988 were due in July, 1987.) Accordingly, the enacting legislation provided that a credit against the gross receipts tax payable for the period July 1, 1986 through September 30, 1987 would be available for personal property taxes paid and allocable to that period, up to the amount of the gross receipts tax. D.C. Code § 47-2501(b)(3)(C) (Supp. 1989). Because of its retroactive features, however, it was available to carriers only to the extent that they already had property in the District, and those carriers which might have had the great preponderance of their property elsewhere during that period had no opportunity to move to the District in order to take advantage of it. For the period September 30, 1987 through June 30, 1988, with respect to which the property taxes were also due and paid in July, 1987, the District gave effect to the exemption by also allowing a credit for the property taxes allocable to that period against the gross receipts taxes due for that period. But, instead of being a credit for the full amount of such property taxes, the credit was reduced to the extent that such personal property was deemed to have been used, per regulations, to produce out-of-District receipts. *See* 9 D.C.M.R. § 3504 (1994).

The District gave effect to such limitations through regulations published in final form on September 25, 1987. 9 D.C.M.R. §§ 709.1(c), 471.3 (1994). At page 13, note 10 of its Petition for a Writ of Certiorari (the "Petition"), the District purports to set forth the regulatory formula which it adopted to give effect to the statutory requirement that the exemption from sales, use and personal property taxes be limited solely to that property which was used or consumed in producing receipts within the District of Columbia and, therefore, taxable by it. Note 10, however, is incorrect in its specification of the numerator under column (3). In the regulations, that specification reads "value of personal property everywhere on July 1 of column 1 tax year." In note 10 the District erro-

neously changed the word "everywhere" to "elsewhere".[2]

In sum, to the extent that a carrier's personal property in the District was used to produce gross receipts in other jurisdictions (and, therefore, not taxable in the District), the personal property, sales and use tax exemptions did not apply. Similarly, the statute made no provision for any credit to the extent that a long-distance carrier used personal property subject to personal property, sales or use taxes in another jurisdiction to produce receipts in the District which were subject to its gross receipts tax.

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[2] Accordingly, the formula in the regulations is correctly stated as follows:

Column (1)		**Column (2)**		**Column (3)**		**Column (4)**
Current personal property tax due before column (4) credit	x	Receipts on which District gross receipts tax is paid for twelve preceding months / Gross receipts everywhere for twelve months preceding column (1) tax year	x	Value of personal property everywhere July 1 of column (1) tax year / Value of property subject to District personal property tax on July 1 of column (1) tax year	=	Credit against Column (1) tax NOT to exceed limits of this section

See 9 D.C.M.R. § 709.1(c) (1994).

The Combined Effects of the Tax and the Exemptions, and the Mathematical Errors in the District's Description Thereof

In the table set forth at page 17 of its Petition, the graph set forth at page 19 thereof, and the accompanying textual discussion, the District purports to illustrate the interrelationship between the gross receipts tax and the personal property tax exemption and the effects thereof on carriers which, in varying degrees, use property in the District or elsewhere to produce receipts in the District. Neither the table nor the graph were part of the record below, and the conclusions the District draws from them are contrary to the conclusions of the D.C. Court of Appeals regarding the effect of the interplay between the tax and the exemptions. As that court correctly observed, under the District's tax scheme if adopted everywhere:

> "out-of-state carriers would pay more [taxes] than in-state carriers whenever the former had property subject to their home state's personal property tax but used to produce out-of-state revenues subject to another state's gross receipts tax."

(App. 22a). Nevertheless, because so much of the District's Petition is based on that table and graph, and because the table and graph, through demonstrable, mathematical errors, incorrectly describe the combined consequences of the tax and the exemptions, Respondents discuss it further.

The regulatory formula adopted by the District to give effect to the statutory command that the tax exemption is available only to the extent that the

property is used or consumed to produce in-District receipts, taxable in the District, can best be understood by focusing on the product of Columns (2) and (3) of the formula set forth in note 2, *supra*, which, stated more simply, can be expressed as:

$$\frac{\text{D.C. Receipts}}{\text{Total Receipts}} \times \frac{\text{Total Property}}{\text{D.C. Property}}.$$

The product of these two fractions times the property tax otherwise owed to the District is the amount of the property tax credit in Column (4). The limitations referred to in Column (4) are that the credit cannot exceed the personal property tax or gross receipts tax otherwise due the District.

Mathematically, the limitation that the credit cannot exceed the property taxes otherwise owed means that the product of Columns (2) and (3) will be arbitrarily set at 1 if it otherwise would be greater than 1. This constraint has effect only when the proportion of property which a carrier maintains in the District is less than the proportion of its receipts in the District, for it is only then that the product of Columns (2) and (3) would be greater than 1.

For example, if a carrier had 20% of its receipts in the District but only 10% of its property there, column (2) would equal 20/100 and Column (3) would equal 100/10. Their product would be (20/100) x (100/10) = 2; but, per the limitation in Column (4), the product of those two numbers will not be given effect to the extent that it exceeds 1. Thus, the carrier would receive a credit for the amount of property taxes otherwise owed to the District, and no more. In contrast, if the carrier maintained 40% of its prop-

erty in the District, then the product of Column (2) and Column (3) would be (20/100) x (100/40) = 1/2; and the carrier would receive a credit only for 1/2 of the property taxes otherwise owed.[3]

As applied to the first hypothetical situation described by the District on page 18 of its Petition, where both the District and Maryland are assumed to have adopted the District's tax regime and where a carrier had 40% of its receipts in the District and 60% in Maryland, the correct analysis under the regulations yields the following results:

1. Under the District's first scenario, which assumes that 10% of the carrier's property is in the District and that the balance (90%) is in Maryland:

With respect to property in the District, Column (2) = 40/100 and Column (3) = 100/

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[3] This reflects the assumptions implicit in the regulations that, in any given year, gross receipts are produced in proportion to personal property and that a dollar's worth of personal property in one state produces the same amount of gross receipts as a dollar's worth of such property in any other state. Thus, if the proportion of a carrier's property which it maintains in the District were twice as high as its proportion of sales there, then 1/2 of the property would be deemed to have been used to produce receipts in the District and 1/2 used to produce receipts elsewhere. It may be that such an apportionment formula is acceptable if used for a permissible purpose. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). But it is being used here to give effect to the statutory command that the exemption is available only to the extent that the property in the District is used to produce receipts there; and there is neither an exemption allowed for property in the District used to produce receipts elsewhere nor an adjustment made if property elsewhere is used to produce receipts in the District.

> 10. (40/100) x (100/10) = 4. So, all of the property in the District—which is 10% of the total—is exempt.[4]
>
> With respect to property in Maryland, Column (2) = 60/100 and Column (3) = 100/90. (60/100) x (100/90) = 2/3. So, 2/3 of the property in Maryland is exempt. Since 90% of the carrier's property is in Maryland, this means 60% of the total is exempt.

So, under these assumed facts, the District would have exempted 10% of the total amount of the carrier's property and Maryland would have exempted 60% of the total, with the result that 70% of all of the carrier's property would be exempt. (The District's Petition incorrectly states that 58% of the property would have been exempt.)

2. Under the District's second scenario, which assumes that 60% of the carrier's property is in the District and that the balance (40%) is in Maryland:

> With respect to property in the District, Column (2) = 40/100, and Column (3) = 100/60. (40/100) x (100/60) = 2/3. So 2/3 of the property in the District is exempt. Since 60% of the total amount of the carrier's property

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[4] The statute speaks in terms of an exemption, which the District has chosen to implement by means of a credit. But, for purposes of the discussion here, the two are essentially equivalent. If a credit is given for all of the property taxes otherwise owed, this is the same as exempting from the tax all of the property on which such tax would otherwise be imposed. Similarly, if a credit is given for 2/3 of the tax otherwise owed, this is the same as exempting 2/3 of the property from the tax.

> is in the District, this means that 40% of the total is exempt.
>
> With respect to property in Maryland, (60/100) x (100/40) = 3/2. So all of the property in Maryland—or 40% of the total—is exempt.

So, under the assumed facts in the District's second scenario, the District would have exempted 40% of the total amount of the carrier's property and Maryland would also have exempted 40% of that total, with result that 80% of the carrier's property would be exempt. (The District's Petition incorrectly states that 48% of the total would have been exempt.)

If the regulatory formula is carefully considered in the light of these examples, it is readily apparent that, contrary to the District's assertion, the property tax exemption for a carrier is maximized (and total taxes minimized) if, and only if, the proportion of its property in the taxing jurisdiction equals the proportion of its sales there. In such circumstances, Column (3) would be the reciprocal of Column (2), and their product would equal 1 for every jurisdiction. As a result, the property which a carrier had in each jurisdiction would be fully exempt.[5] In contrast, if the personal

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[5] The District does not explain in its Petition how it prepared the table on page 17 and graph on page 19. It appears that it may have produced them simply by multiplying the columns and rows. Thus, for the information in the top left-hand corner, the 1% exemption attributable to the District equals 10% x 10%, and the 81% exemption attributable to Maryland equals 90% x 90%. This, however, is equivalent to erroneously omitting Column (3) from the calculations. To illustrate by using one of the hypotheses on page 18 of the Petition as an example, if a carrier had 40% of the carrier's receipts in the District but only 10% of its property there, by failing to include the fraction defined

property were not allocated in proportion to gross receipts then, *ipso facto*, the proportion of property in at least one jurisdiction would have to be greater than the proportion of sales there. Since, as a mathematical certainty, the product of Column (2) times Column (3) for that jurisdiction would be less than 1, the property which the carrier maintained there would not be fully exempt; and the carrier would have to pay some tax thereon. Moreover, the carrier could reduce its total tax burden by reconfiguring how it distributed its facilities among the various states to bring the proportion of property which it maintained in that jurisdiction into balance with the proportion of its sales there.

The results discussed above flowing from the application of the District's regulatory formula simply underscore the purpose of its regulations. That purpose is to give effect to a statutory requirement that the personal property, sales and use tax exemptions would only be available to the extent that such property was used in the District to produce receipts there. The District, because of the mathematical errors in its table and graph, has obscured this; but the court below correctly perceived it. And as a result of that statutory requirement, a long-distance carrier based in the District which provided services outside thereof, and long-distance carriers based outside the District

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in Column (3) in the calculation, the District would erroneously have concluded that 40% of the carrier's property in the District, and 60% of its property in Maryland, was exempt from tax. Since, by hypothesis, 10% of the carrier's property was in the District and 90% was in Maryland, this would mean that the aggregate percentage of the total that was exempt would be [(.40 x .10) + (.60 x .90)] = [.04 + .54] = 58%, which is what the District's Petition erroneously asserts.

which provided services therein, both faced higher taxes than a long-distance carrier which maintained in the District only that property which it used or consumed to produce revenues there and neither used property outside the District to produce in-District revenues nor used such in-District property to produce out-of-District revenues. As the court below observed, under the District's statutory scheme, the only company which "can fully benefit from the available exemption is one that sells in District . . . only what it produces there . . ." (App. 23a)

The distortive effects of the District's scheme on the free flow of commerce are particularly acute here given the technological aspects of the carriers' business and the tri-jurisdictional nature of the Washington, D.C. metropolitan area. As the record below showed, each carrier only needs a single switch in order to serve that area efficiently; and the District's scheme would provide an incentive to split the switch into pieces proportional to sales and locate one of those pieces in the District, thereby producing inefficiencies. But, just as importantly, as the court below also correctly perceived, the distortive effects of such a scheme would be even greater if all jurisdictions adopted it. In such circumstances, a carrier would have an incentive to locate in a state only that property used or consumed in producing receipts in that state, thereby becoming a "home operator" in each rather than deciding according to general business considerations where to locate its facilities. (App. 23a)

REASONS FOR DENYING THE WRIT

I. The Petition is Premature

The decision of the D.C. Court of Appeals was not a final judgment under 28 U.S.C. § 1257. Therefore,

for that reason and because substantial federal issues remain in the case which the court below has yet to decide, the District's Petition is premature and should be denied.

In the appeal below, the long-distance carriers raised several other federal issues in addition to the constitutionality under the Commerce Clause of the District's tax scheme. In particular, they also urged that the delegation of authority pursuant to which the District enacted the tax violated the Origination Clause set forth in Article I, Section 7, cl. 1 of the Constitution and that the retroactive portions of the tax violated the Due Process Clause.

Although the court below considered the Origination Clause issue and ruled against the carriers with respect thereto, it expressly declined to rule at that time on the Due Process Clause issue. Further, although it considered and held in the carriers' favor with respect to the Commerce Clause issue, it:

> [did not] enter judgment for appellants', however, "because federal law does not necessarily entitle them to a refund," and the District of Columbia may "create[ ] in hindsight a nondiscriminatory scheme." *Harper v. Virginia Dep't of Taxation, supra,* 113 S.Ct. at 2519-20. (dictum) (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra,* 496 U.S. at 40.

(App. 26a)

Thus, under the decision of the District of Columbia Court of Appeals, the remedy has yet to be determined; and fashioning an appropriate remedy in the trial court on remand from the District of Columbia

Court of Appeals is itself a federal question raising serious federal issues which that court most likely will have to consider on an appeal from the decision in the remanded proceedings. Further, under this Court's opinion in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 40-41 (1990), there is a significant possibility that any remedy will provide less than a complete refund of the total taxes paid. As a result, with respect to the retroactive portion of the tax, it is to be expected that the court below will also have to consider in any such appeal the Due Process Clause issue on which it previously declined to rule.

For these reasons, therefore, the District's Petition should be denied as premature. In the proceedings below, no final judgment has yet been entered; and the proceedings below on remand are not merely ministerial or otherwise a foregone result. Instead, they will raise significant federal questions about which it is expected there will be substantial dispute. In addition, whatever may be the outcome on remand in fashioning a remedy with respect to the Commerce Clause issue, other federal questions remain in the case on which the court below declined to rule but which it is to be expected it will still have to consider.

II. The Petition Does Not Raise an Important Federal Question

The District does not assert that the decision below conflicts with the decision of another state court of last resort or of a United States Court of Appeals. It also does not assert that the court below has decided a federal question in a way that conflicts with applicable decisions with this Court. Nor does it assert that the decision below calls into question the validity of similar statutes in a great many other states.

At best, what the District seems to assert, albeit impliedly rather than directly, is that the decision below raises an important question of federal law which has not been decided. That is not the case, however. As the unanimous opinion of the court below demonstrates, its decision was a simple and straight forward application of this Court's decisions in *Boston Stock Exch. v. State Tax Com.*, 429 U.S. 318 (1977); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); and *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). Furthermore, the factual premise upon which the District bases the question it seeks to present—i.e., that its scheme does not favor locally-based taxpayers—is wrong. As the discussion above shows and the court below found, the tax does advantage locally-based taxpayers over those seeking to provide service from without the District. (App. 23a) Therefore, the facts of this case do not raise the question which the District asks this Court to review.

A. Contrary to the District's Apparent Position, This Is not an Apportionment Case

It is important to note that this case does not present an apportionment-type of issue, despite the apparent impression which may be created to the contrary by the District's reliance in its Petition upon *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, 490 U.S. 66 (1989); and *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991). The carriers did not argue on appeal that, absent the discriminatory exemptions, the District was taxing more than its fair share of their gross receipts. And they freely concede that the District could tax all of their personal property there. So, unlike those cases, there is no issue here regarding whether the District is taxing more than its fair share of an apportionable tax base. Therefore, the principle for which the District cites those opinions—i.e., that an apportionment formula which has a rational basis will be sustained—is irrelevant here.

Instead of apportionment, the issue in this case is the geographically discriminatory feature of the District's tax regime. This Court has made plain that a fairly apportioned tax can still be unconstitutionally discriminatory if it is conjoined with credits which are based on discriminatory categories. *Westinghouse Electric Corp., supra.* " 'Fairly apportioned' and 'nondiscriminatory' are not synonymous terms." *Id.*, 466 U.S. at 397. *Cf. Amerada Hess Corp.*, 490 U.S. at 75. And, while a state is accorded great latitude in fashioning an apportionment formula so long as the

formula rests on a rational relationship and does not yield results out of all appropriate proportion with the taxpayer's business there, taxes which are otherwise discriminatory are sustained only if they satisfy exacting standards of equality through compensating or other adjustments. *Compare Barclays Bank PLC v. Franchise Tax Board of California*, 62 U.S.L.W. 4552, 4556 (June 20, 1994) (quoting from *Container Corp. of America v. Franchise Tax Bd.*) *with Associated Indus. v. Lohman*, 114 S.Ct. 1815, 1820-1822 (1994).

B. The District's Tax Scheme Falls Squarely within the Scope of this Court's Decisions in *Armco, Inc. v. Hardesty* and *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*

The District's tax unabashedly discriminates on the basis of geographic location. By its own admission, the District imposed its gross receipts tax in lieu of personal property, sales and use taxes imposed on personal property used in the business of providing interstate long-distance telephone service. The exemptions from those latter taxes, however, are not generally available for all property in the District used in providing such long-distance service anywhere. Instead, they are available to the extent, and only to the extent, that the property is used or consumed in the District to produce receipts in the District. To the extent that such property is used in the District to produce receipts outside the District, the exemption is not available. Similarly, to the extent that a carrier uses property outside the District in some other jurisdiction to produce receipts in the District and taxable therein, no corresponding adjustment is made for

any taxes imposed by the foreign jurisdiction on such property.

The result of such a tax scheme is to burden interstate commerce by creating an incentive for a long-distance telephone company to assure that it locates in the District, rather than elsewhere, the personal property used or consumed in producing the taxable receipts it realizes there. Further, applying the internal consistency test, if each jurisdiction adopted a similar tax, the result would be that every company would situate in each state the exact amount of facilities needed to produce telephone calls in that state, and not a jot or a tittle more. It would be penalized if it chose to locate proportionately more of its facilities in some other jurisdiction and provide the service from without.

This Court has twice in the recent past considered a tax structure like that adopted by the District here, i.e., the imposition of dual levels of taxation with exemptions from one such level dependent upon the extent to which the taxpayer produces in the state the goods or services which it sells there so that it is subject to tax at the other such level. *See Armco, Inc.* and *Tyler Pipe Industries, Inc.* In both instances, this Court found that the taxes unconstitutionally favored locally-based businesses over businesses based in other jurisdictions. In the process, it rejected claims that the combination of tax and exemptions could be justified on the basis that one tax was "compensating" for the inability to apply the other. And, further, it rejected claims (also made by the District here) that the out-of-state business could avoid double tax simply by moving to the local jurisdiction, noting that such

economic compulsion was what the Commerce Clause was intended to prevent. *See also Boston Stock Exch.*

Tyler Pipe Industries, Inc. involved so-called "compensating" taxes on manufacturing activities and on gross sales. There, the state of Washington imposed a gross sales tax on all transactions within the state, both those sales made by in-state manufacturers as well as those made by out-of-state manufacturers. Additionally, it imposed a tax on manufacturing activities. It exempted from the manufacturing tax, however, that portion of the manufacturer's local output which was sold within the state. Thus, local manufacturers paid a tax on their local gross sales and were exempt from any manufacturing tax with respect thereto. Out-of-state manufacturers were also subject to the gross sales tax on their sales in Washington, but with no credit or other relief therefrom if they were also subject to a manufacturing tax in their home states. This Court found that the tax impermissibly discriminated against both local manufacturers which sold out-of-state and out-of-state manufacturers which sold within the state. *See Tyler Pipe Industries, Inc.*, 483 U.S. at 240-41, 243, 248.

The District's tax, with its various exemptions from personal property, sales and use taxes with respect to personal property used to produce the taxable gross receipts, acts in precisely the same discriminatory fashion as the tax regimes which were voided in *Armco, Inc.* and *Tyler Pipe Industries, Inc.* Just like the in-state manufacturers in *Tyler Pipe Industries, Inc.*, a telecommunications company which has personal property in the District is exempt from taxes thereon to the extent that it uses or consumes that property to produce receipts in the District. To the

extent that it uses its property there to produce out-of-District receipts taxable elsewhere, however, the exemption is not available. By the same token, just like the out-of-state manufacturers in *Tyler Pipe Industries, Inc.*, a telecommunications company which holds its property outside the District would be liable for the full amount of the gross receipts tax for receipts derived from the District with no relief for any personal property, sale or use taxes levied on the property it used to produce those receipts.

Thus, the only carriers which can fully benefit from the exemptions are those which maintain as much personal property in the District as the District determines, per its regulations, are needed to produce the in-District receipts which the District taxes. And, if each state adopted the District's statutory tax structure, out-of-state operators would pay multiple taxes and home operators would pay only a single tax. A company which concentrated its facilities in one state, but provided services in many, would pay a gross receipts tax on all of its receipts and a personal property tax (and sales and use taxes) on all but a small portion of its personal property. In contrast, a company which spread its facilities among the several states so that, in each state, it would be found under the statute only to have property there which it used or consumed in producing the services which were taxable there—thereby becoming essentially equivalent to a home operator in each state—would pay a gross receipts tax, but would not pay a personal property tax, or sales or use taxes, anywhere.

In other words, under the District's statutory scheme, the only person who fully benefits from all the available exemptions is one who sells in a state

only what it produces there. Similar benefits are not available to those present locally who sell outside the state, or to those outside the state who sell within it. Such a regime clearly violates the standards of nondiscrimination adopted by this Court in *Armco, Inc.* and *Tyler Pipe, Industries, Inc.*, and the court below correctly perceived that. *See also Westinghouse Electric Corp.*, *supra*. (credits could not be made available on a discriminatory basis to reduce what was otherwise a fairly apportioned tax). Moreover, such a formula geographically constrains a multi-state operation in locating its investment and the states in which it makes sales. Such constraint is incompatible with the concept of a national market underlying the Commerce Clause.

C. This Case Does not Present the Facts upon which the District's Petition is Based or Raise Any New Issues

The District attempts to avoid the thrust of the analysis above by arguing that there nevertheless is an important question to be resolved. Primarily, it urges that its tax scheme does not favor home producers and that, to the extent that the internal consistency doctrine under *Tyler Pipe Industries, Inc.*, nevertheless would require the statute to be declared invalid, application of the doctrine should be limited in some unspecified way. *See* Petition at pp. 16-20, 24-25. Secondarily, it attempts to disparage the Constitutional significance of any discriminatory effects of its scheme by suggesting that the consequences thereof are either not substantial or are not fully controllable or predictable because of the vagaries of competition and other business factors. *See* Petition, at pp. 20-21.

As to the first point, the District's argument is based on its purported analysis, set forth in the table on p. 17 and the graph on p. 19 of its Petition, regarding the interplay between the gross receipts tax and the conjoined exemptions. It argues from that analysis that there is no correlation between the extent to which a carrier disperses its property among the various jurisdictions and the extent to which its property is exempt, so that it cannot be said that its scheme favors the home producer. As discussed above, however, its analysis in this regard is flawed by the mathematical errors it committed. Consequently, the facts simply do not present the question which the District says needs to be considered. And the further fact is that, as discussed above and as the court below recognized, the statute clearly favors home producers on its face, since it makes the exemptions available only to the extent that the carrier's property in the District is used or consumed to produce sales in the District.

As to the second point—that the discrimination is not Constitutionally significant because its results are both unpredictable and small when compared to other business issues—that suggestion does not add anything novel to the analysis, or raise a new issue for this Court to consider. The same issue was present in *Tyler Pipe Industries, Inc.* There, the optimal benefits from exemption were available only if the seller correctly anticipated the demand for its product in each state and built exactly enough manufacturing capacity there to meet that demand, and no more. Certainly, the complexities in such a calculation are the same type as, and are no less substantial than,

those which the District bewails. And they did not deter this Court from reaching its decision.

Thus, even though the optimal allocation may require exceedingly close—and perhaps fortuitous—predictions, that cannot diminish the fact that, as was the case in *Tyler Pipe Industries, Inc.*, the structure adopted by the District distorts decision-making by businesses and interferes with the free flow of commerce among the states by creating an incentive for a business to produce in a state only what it sells there in order to avoid the discriminatory treatment. Further, any doubt, in the context of a discriminatory tax, that even small differences are important was recently laid to rest in *Associated Indus.*, 114 S.Ct. at 1823, where this Court affirmed that small differences in treatment are constitutionally significant and that "close enough for government work" is no defense.[6]

Finally, the significance of the discrimination is not avoided by the fact that the services provided, whether provided by a home-based operator or by a foreign-based operator, all involve transactions in interstate commerce. In *Boston Stock Exch.*, this Court made clear that a state may not discriminate among interstate transactions based upon the extent to which one or the other might have a stronger element of "home connection." There, the Court concluded that the ability of the State of New York to tax stock

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[6] Moreover, as the District noted at p. 7-8 and n.8 of its Petition, the amounts put in issue because of the interplay of the tax and exemptions are "large" and "substantial." So, in any event, it ill-behooves the District to suggest that the taxpayers would ignore those amounts in arranging their affairs.

transfers did not permit it to establish a discriminatory scheme which compelled people who were otherwise selling stock that had some connection with New York to assure that the sale actually took place on a New York exchange. So too here, under *Boston Stock Exch.* the District may not use its ability to tax the in-District sales of long-distance telephone calls to compel the carriers providing such service to locate in the District the personal property used or consumed to produce those calls. *See also Westinghouse Electric Corp., supra* (discriminatory credit against a fairly apportioned tax for export sales shipped from New York site was unconstitutional).

In short, the exemptions are not generally available, nondiscriminatory exemptions of which any carrier can take advantage, despite the District's assertions to the contrary. It would be one thing if the District had simply exempted from its personal property, sales and use taxes personal property which was used in the District in connection with interstate telephone service. That would be a fair encouragement of economic activity within its jurisdiction. And, contrary to the assertion of the District at p.21 of the Petition, such an unrestricted exemption would not unduly advantage "home producers"—i.e., those who sold in the state only what they produced there—because it would be available to one and all, whether they used such property in connection with calls that might generate receipts in some neighboring jurisdiction or whether they used it to produce calls that generated receipts only in the District.

The District did not do that, however. It is true that, just as was the case in *Tyler Pipe Industries, Inc.*, the exemptions may be available to a carrier

which wishes to take advantage of them and move its facilities to the District; and that is what the District claimed below when it told the Superior Court that "out-of-state competitors could move to the District to take advantage of the incentives provided here."[7] (Defendants' Opposition filed January 13, 1988, at 45). Just as was also the case in *Tyler Pipe Industries, Inc.*, however, the exemptions are available only to the extent that the facilities which the carriers have in the District are used or consumed in producing taxable receipts there; and no compensating credit is provided for any taxes which might have been paid on property located outside the District but used to produce taxable receipts within. The court below correctly perceived that this was discrimination against interstate commerce which this Court has proscribed in numerous decisions.

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[7] However, with respect to the retroactive portion of the tax and exemptions, even that was not a possibility. The property which the carriers maintained in the District during the retroactive period was fixed as of the date of enactment, and the carriers could not retroactively move property to the District in order to take advantage of the retroactive exemption.

CONCLUSION

For the foregoing reasons, the Petition should be denied. It is premature. Further, in light of the obvious geographic discrimination underlying the District's statute, there is no significant federal question that this Court needs to decide.

Respectfully submitted,

JOHN M. WOOD
*JOSEPH A. RIESER, JR.
REED SMITH SHAW
& MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

Attorneys for AT&T Corp. and AT&T Communications of Washington, D.C., Inc.

WILLIAM MALONE
MILLER, CANFIELD, PADDOCK
& STONE
1225 19th Street, N.W., #400
Washington, D.C. 20036
(202) 785-0600

Attorney for Sprint Communications Company, L.P., Cable & Wireless, Inc., and LDDS Metromedia Communications Corporation

MITCHELL F. BRECHER
DONELAN, CLEARY, WOOD
& MASER
1275 K Street, N.W.
Suite 850
Washington, D.C. 20005
(202) 371-9500

Attorney for Allnet

PAUL M. TENDLER
TENDLER, GOLDBERG, BIGGINS
& GELTZER
1090 Vermont Avenue, N.W.
Suite 1200
Washington, D.C. 20005-4905
(202) 682-9000

Attorney for Metrocom

Of Counsel:

CHARLES R. WUNSCH
SPRINT COMMUNICATIONS
COMPANY, L.P.
Mailstop: KSWESA0108
2330 Shawnee Mission Parkway
Westwood, Kansas 66205
(913) 624-8361

**Counsel of Record*

ANDREW D. LIPMAN
RUSSELL M. BLAU
SWIDLER & BERLIN,
CHARTERED
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007-3841
(202) 424-7500

*Attorneys for Richard J.
Rice, Inc.*

ERIC F. FACER
ZUCKERMAN, SPAEDER,
GOLDSTEIN, TAYLOR &
KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 778-1801

Attorney for RealCom

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,
v.
SPRINT COMMUNICATIONS COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

VANESSA RUIZ
Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

*EDWARD E. SCHWAB
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001
Tel: (202) 727-6252, Ext. 3305
**Counsel of Record*

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I. This Case Is Important to Clarify that a State Tax Scheme Will Not Be Held Invalid Under the Commerce Clause Unless it Discriminates against Interstate Commerce in Some Significant Way.

As we showed in the petition, the District of Columbia tax statute at issue in this case is a fairly apportioned gross receipts tax on interstate telephone calls. Calls originating or terminating in the District and billed to a District number are taxed. In order not to burden a second time the interstate activity subject to the gross receipts tax, those companies subject to the tax who have personal property in the District are relieved of the District's personal property tax to the extent that this personal property is used to generate the gross

receipts subject to the gross receipts tax. As we showed, the legislative choice to exempt only so much personal property as was used to generate gross receipts subject to the tax avoided creating a double tax burden on carriers with personal property in the District, on the one hand, but avoided creating an undue tax advantage for carriers simply because they have personal property in the District, on the other. In other words, the exemption was tailored to avoid double taxation and not to benefit businesses for locating in the jurisdiction.

The court below held that the District's tax was constitutionally infirm under the Commerce Clause because the personal property tax exemption was tailored in this way. The court below felt that it was constrained by this Court's precedents to do so, particularly the internal consistency test as applied in *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987).

We have sought review here because the District's tax at issue does not discriminate against interstate commerce in any significant way. The fact that it can be considered to do so under the Court's precedents simply demonstrates how badly this area of the Court's jurisprudence needs reexamination or clarification. In brief, our argument is that, if this Court's precedents do require the invalidation of this tax scheme, they have become so disconnected from the purposes of the Commerce Clause that they should be reconsidered; if the Court's precedents do not require that result, the fact that the Court below thought that they did shows that the Court must clarify its doctrine in this area.

Respondents' opposition to our petition underscores our point. Our petition showed that, unlike the state tax in *Tyler Pipe*, the District's tax scheme here does not prefer interstate to intrastate commerce because the District's tax only involves

interstate commerce; telephone calls that cross state lines. Pet. at 22-23. However, the respondents argue that, under this Court's precedents, the District's tax scheme must be treated as "creating an incentive to produce in a state only what it sells there." *Id.* at 23. In other words, according to respondents, this Court's precedents require the District's scheme to be treated as if it preferred intrastate commerce even though it does not do so in fact. The court below relied on that argument in holding this tax invalid. App. at 23a.

More important, the evil that respondents identify in the District's tax is that it "creat[es] an incentive for a long-distance telephone company to ... locate[] in the District, rather than elsewhere, the personal property used or consumed in processing the taxable receipts it realizes there." Opp. at 18. This, respondents argue, is impermissible because it contravenes this Court's holdings in *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) and *Westinghouse Electric Corp. v. Tully*, 483 U.S. 232 (1987). *Id.* at 23-24. However, *Boston Stock Exchange* and *Westinghouse Electric Corp.* invalidated tax schemes which benefitted companies more to the extent that they did more business in the jurisdiction. Respondents recognize that the tax here does no such thing. Indeed, they argue that this tax is bad because it penalizes interstate businesses who concentrate their personal property in any one jurisdiction. *Id.* at 20. In fact, they argue that this tax is bad precisely because, if adopted everywhere, it would reward a company "which spread its facilities among the several states." *Id.* We have argued that the notion that a personal property exemption that works as this one does will in fact cause companies to disperse their personal property is far-fetched in the extreme. Pet. at 20-21. But, it is certainly a strange notion that a tax which results in a company spreading its facilities in many states--which would seem to promote

commerce between the states--somehow disadvantages inter-state commerce.

What respondents' objection seems really based on is the notion that a state tax must be structured so that it does not affect a firm's decisions about where to do business. See Opp. at 21 ("such a formula geographically constrains a multi-state operation in locating its investment and the states in which it makes sales"). However, as we pointed out in the petition (at 23), this Court has repeatedly emphasized that a state may purposely design its tax system to promote in-state investment. Accordingly, even respondents grudgingly concede that "fair encouragement of economic activity within its jurisdiction" is permissible. Opp. at 24. The real question then is what sorts of effects on business decisions are "unfair."

What respondents say is unfair is the District's failure to exempt from its personal property tax all the personal property of the communication carriers in the District because "such an unrestricted exemption . . . would be available to one and all, whether they used such property in connection with calls that might generate receipts in some neighboring jurisdiction or whether they used it to produce calls that generated receipts only in the District." Opp. at 24. In other words, the only fair tax is one which rewards most companies who concentrate the most personal property in the District. That cannot be required by a constitutional provision intended to prohibit state protectionism.

Both the ruling below and respondents' arguments demonstrate that this Court's decision in this area are no longer perceived as grounded in preventing preferences for intra-state commerce or intra-state businesses. This case provides an excellent vehicle for clarifying that it is only such important

federal purposes which can justify a court invalidating a state tax statute under the Commerce Clause.

II. The Petition Is Not Premature; the Court Has Jurisdiction under 28 U.S.C. § 1257.

The respondent telephone companies argue that the petition is premature, asserting that the judgment of the District of Columbia Court of Appeals is not final under 28 U.S.C. § 1257. Opp. at 12-14. The argument should be rejected, because the Court of Appeals' decision has practical finality.

Jurisdiction is present under 28 U.S.C. § 1257 (a), which authorizes the Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . by writ of certiorari . . . where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . .." The District of Columbia Court of Appeals is the "highest court of a State" for purposes of this section. 28 U.S.C. § 1257 (b). The Court has adopted a pragmatic and flexible approach to finality under the section and has recognized at least four categories of cases in which state court judgments have been found to be final under the section even though they did not terminate the litigation. *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 476-87 (1975); *Brown Shoe Co. v. United States,* 370 U.S. 294, 306 (1962).

The decision of the Court of Appeals is a final decision of the highest court in the District of Columbia. Its declarations that the District of Columbia Council had authority under the Constitution and under local law to enact the tax and that the tax is unconstitutional because it violates the Commerce Clause are final decisions that are not subject to further consideration or review under local law. The only issue present-

ed to the Court of Appeals that it did not decide concerned the retroactivity of the tax. There was no need to decide that issue in light of the declaration that the tax violates the Commerce Clause. Retroactivity is an issue in the case only if there is a constitutional statute.

The Court of Appeals remanded the case to the Superior Court for further proceedings; however, the next step contemplated by the Court of Appeals' decision is the enactment by the District of Columbia Council, the District's legislature, of an amendment to the tax on the long-distance companies to repair the unconstitutionality that was found. App.at 25-26. This aspect of the decision conforms to recent decisions of this Court. See, *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 51-52 (1990); *Harper v. Virginia Dep't of Taxation*, 113 S.Ct. 2510, 2520 (1993); and *Associated Industries of Missouri v. Lohman*, 114 S.Ct. 1815, 1825 (1994). The only trial court order that will be appropriate on remand, at least initially, is an order that will trigger legislation by the District of Columbia Council to repair the unconstitutionality found by the Court of Appeals. The telephone companies may challenge any retroactive features in the amended statute.

The Court of Appeals' decision is within the third category recognized in *Cox Broadcasting Corp.* as being final under § 1257(a): "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481; *see also, North Dakota State Board of Pharmacy v. Snyder's Drug Store, Inc.*, 414 U.S. 156, 162-163 (1973). Once the District's legislature amends the statute, any further proceedings in the case will concern the amended statute. It is highly doubtful that the District of Columbia could then

obtain review of the decision holding unconstitutional the current, unamended statute. Therefore, if review is to be had, it must be obtained now.

The District of Columbia should be able to obtain review of the Court of Appeals' decision before it amends its statute. For these reasons, the decision of the Court of Appeals is final for purposes of review by this Court.

III. The District's Tax Has No Inherent Tendency to Benefit In-State Companies.

In its petition, the District argued that its tax does not inherently favor in-District companies because "a company does *not* always benefit by increasing its presence (i.e., its personal property) in the District." Pet. at 18; italics in original. We submitted a table and a graph to show "in a somewhat simplified form," Pet. at 18, that "in a great many circumstances, *increasing* either a company's property in the District, or its percentage of receipts in the District, *decreases* the amount of personal property sheltered from personal property taxes." *Id.*; italics in original. Respondents spend a great deal of space in their Opposition (at 6-11) arguing that our table and graph do not reflect the precise figures that result from applying the District's formula for calculating the personal property tax exemptions. We confess that we may have oversimplified. However, our simplification did not affect our point that, under the District's tax statute, increasing a firm's presence in D.C. (either its personal property or the percentage of its business) often does not produce a tax benefit. We set forth herein a table computing the precise amounts that would result from the application of the District's formula for computing the personal property exemption if two jurisdictions (the District and Maryland) both adopt the District's telephone tax statute. It shows, for example, that if

a firm has 40% of its business in the District, *increasing* its personal property in the District from 40 to 90% *decreases* the amount of its personal property sheltered from taxes in both jurisdictions from 100% to 50%. Similarly, if a firm has 40% of its personal property in the District, *increasing* the amount of a firm's business in the District from 40% to 90% *decreases* the amount of its personal property sheltered from taxes in both jurisdictions from 100% to 50%.

What application of the precise formula does emphasize is that a firm maximizes the amount of personal property sheltered from taxes in both jurisdictions if the percentage of its business and the percentage of its personal property in each jurisdiction is the same. But, as shown above, although that might influence to some extent business decisions as to where to do business, and even create some incentive to disperse business in several jurisdictions, neither consequence implicates the Commerce Clause.

The graph also shows that, even if a firm could predict and/or control the variables involved that govern how much of its property is sheltered from tax (but see our discussion, Pet. at 20-21), any incentives to disperse business are more modest than respondents pretend. Thus, the table shows the very broad range of distributions of property and gross receipts between two jurisdictions under which a company would shelter the vast majority of its property from personal property and sales and use taxes. With 40% of its gross receipts in the District, a company would shelter at least 70% of its property from taxation if anywhere from 10% to 70% of its property were in the District. Increasing the property in the District to 80% would mean that 60% would still be sheltered. The company with 40% of its business in the District would shelter at least 80% of its property from taxation if between 20% and 60% of its property were in the District. Similarly, if a com-

pany had 40% of its personal property in the District, at least 70% of its total personal property would be sheltered if its gross receipts attributable to the District remained between 10% and 70% of the total receipts from both jurisdictions.

As can be seen from these examples and from the table itself, very broad ranges of distributions of personal property and gross receipts among the jurisdictions where the companies do business permit a company to shelter a very high percentage of its property from taxation. Such distributions are likely to occur without regard to tax considerations. The companies are in the business of selling a service. The record indicates that they have a substantial presence in the jurisdictions where they sell those services.

What the table makes absolutely clear is that the District's tax scheme does not favor firms because they have a large presence in the District. This tax statute was not protective of in-state firms and does not favor, or even involve, intra-state commerce. There is no justification for holding that this tax statute violates the Commerce Clause.

CONCLUSION

This Court should clarify or reconsider the internal consistency test applied in *Tyler Pipe* in the context of this case. The 1987 District of Columbia law does not significantly burden interstate commerce and is much less burdensome than internally consistent alternatives.

Respectfully submitted,

VANESSA RUIZ
Acting Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

*EDWARD E. SCHWAB
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001
Tel: (202) 727-6252, Ext. 3305

**Counsel of record*

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PERCENT OF TOTAL PROPERTY IN DISTRICT OF COLUMBIA

PERCENT OF FIRM'S CALLS TAXED IN D.C.	10%	20%	30%	40%	50%	60%	70%	80%	90%
0	90 ALL MD	80 ALL MD	70 ALL MD	60 ALL MD	50 ALL MD	40 ALL MD	30 ALL MD	20 ALL MD	10 ALL MD
10%	100 10% DC 90% MD	90 10% DC 80% MD	80 10% DC 70% MD	70 10% DC 60% MD	60 10% DC 50% MD	50 10% DC 40% MD	40 10% DC 30% MD	30 10% DC 20% MD	20 10% DC 10% MD
20%	90 10% DC 80% MD	100 20 DC 80% MD	90 20% DC 70% MD	80 20% DC 60% MD	70 20% DC 50% MD	60 20% DC 40% MD	50 20% DC 30% MD	40 20% DC 20% MD	30 20% DC 10% MD
30%	80 10% DC 70% MD	90 20% DC 70% MD	100 30% DC 70% MD	90 30% DC 60% MD	80 30% DC 50% MD	70 30% DC 40% MD	60 30% DC 30% MD	50 30% DC 20% MD	40 30% DC 10% MD
40%	70 10% DC 60% MD	80 20% DC 60% MD	90 30% DC 60% MD	100 40% DC 60% MD	90 40% DC 50% MD	80 40% DC 40% MD	70 40% DC 30% MD	60 40% DC 20% MD	50 40% DC 10% MD
50%	60 10% DC 50% MD	70 20% DC 50% MD	80 30% DC 50% MD	90 40% DC 50% MD	100 50% DC 50% MD	90 50% DC 40% MD	80 50% DC 30% MD	70 50% DC 20% MD	60 50% DC 10% MD
60%	50 10% DC 40% MD	60 20% DC 40% MD	70 30% DC 40% MD	80 40% DC 40% MD	90 50% DC 40% MD	100 60% DC 40% MD	90 60% DC 30% MD	80 60% DC 20% MD	70 60% DC 10% MD
70%	40 10% DC 30% MD	50 20% DC 30% MD	60 30% DC 30% MD	70 40% DC 30% MD	80 50% DC 30% MD	90 60% DC 30% MD	100 70% DC 30% MD	90 70% DC 20% MD	80 70% DC 10% MD
80%	30 10% DC 20% MD	40 20% DC 20% MD	50 30% DC 20% MD	60 40% DC 20% MD	70 50% DC 20% MD	80 60% DC 20% MD	90 70% DC 20% MD	100 80% DC 20% MD	90 80% DC 10% MD
90%	20 10% DC 10% MD	30 20% DC 10% MD	40 30% DC 10% MD	50 40% DC 10% MD	60 50% DC 10% MD	70 60% DC 10% MD	80 70% DC 10% MD	90 80% DC 10% MD	100 90% DC 10% MD
100%	10% ALL DC	20% ALL DC	30% ALL DC	40% ALL DC	50% ALL DC	60% ALL DC	70% ALL DC	80% ALL DC	90% ALL DC

PER CENT OF PERSONAL PROPERTY TAX AVOIDED (IN HYPOTHETICAL MD & DC)
WHERE MD HAS IDENTICAL TAX AS DC (FOR DIFFERENT COMBINATIONS OF DISTRIBUTION
OF PROPERTY AND TAXABLE CALLS)